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ABSTRACT

Collective bargaining in higher education and a few other fields is examined in 21 papers from a 1986 conference of the National Center for the Study of Collective Bargaining in Higher Education and the Professions. After an introduction by Joel M. Douglas, the academic collective bargaining system is reexamined in four papers. Additional papers consider: bargaining in selected other fields, bargaining in private colleges after the "Yeshiva" decision, compensation issues, bargaining with nontenure track faculty, legal issues, and faculty discipline. Paper titles and authors are as follows: "The Evolving Faculty Condition: What Is the Relevance to the Collective Bargaining Community?" (Jack H. Schuster); "Peer Review and Faculty Self Government: A Dissenting View" (Myron Lieberman); "Campus Realities: Is Collective Bargaining Equipped to Deal with Them?" (Barbara Lee); "The Faculty Opportunities Audit" (Clara M. Lovett); "Labor Relations in Baseball" (Donald M. Fehr); "The Physicians" (Barry Liebowitz); "Actors' Unions" (Dick Moore); "Professional Employees" (Jack Golodner); "Bargaining in Private Colleges in the Aftermath of 'Yeshiva': (1) Yeshiva University (Ralph E. Behrends), (2) Boston University (Michael Rosen), (3) Polytechnic Institute of New York (Marvin Gettleman), (4) Cooper Union" (Eugene Tulchin); "Merit Pay and Market Adjustments" (Linda Tom); "Salary

Incentive Systems" (William S. Brown); "Bargaining with 'Nontenture Track' Faculty" includes: "The Massachusetts Experience" (Arlyn Diamond); The California Experience (David Averbuck); The Canadian Experience" (Ron Levesque); "A Legal Analysis of Collective Bargaining in Higher Education" (Woodley B. Osborne); "The Melani Sex Discrimination Class Action Suit" (Joan Rome); and "The Discipline of Faculty: The Administrative Perspective (Joan Getter), The Union Perspective" (Nuala M. Drescher). (SW)

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THE UNIONIZED PROFESSORIATE:
A Discriminating Appraisal

Proceedings
Fourteenth Annual Conference
April 1986

JOEL M. DOUGLAS, *Editor*

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National Center for the Study of
Collective Bargaining in Higher Education
and the Professions—Baruch College, CUNY

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TABLE OF CONTENTS

I. INTRODUCTION i
Joel M. Douglas

II. REEXAMINING THE SYSTEM: A CRITICAL REVIEW OF THE PROCESS 1

A. THE EVOLVING FACULTY CONDITION: WHAT IS THE RELEVANCE TO THE COLLECTIVE BARGAINING COMMUNITY? 3
Jack H. Schuster

B. PEER REVIEW AND FACULTY SELF GOVERNMENT: A DISSENTING VIEW 13
Myron Lieberman

C. CAMPUS REALITIES: IS COLLECTIVE BARGAINING EQUIPPED TO DEAL WITH THEM? 23
Barbara Lee

D. THE FACULTY OPPORTUNITIES AUDIT 28
Clara M. Lovett

III. HOW "OTHER PROFESSIONS" BARGAIN 31

A. LABOR RELATIONS IN BASEBALL 33
Donald M. Fehr

B. THE PHYSICIANS 41
Barry Liebowitz

C. ACTORS' UNIONS 45
Dick Moore

D. PROFESSIONAL EMPLOYEES 49
Jack Golodner

IV. BARGAINING IN PRIVATE COLLEGES IN THE AFTERMATH OF YESHIVA 55

A. YESHIVA UNIVERSITY 57
Ralph E. Behrends

B. BOSTON UNIVERSITY 61
Michael Rosen

C. POLYTECHNIC INSTITUTE OF NEW YORK 66
Marvin Gettleman

D. COOPER UNION 71
Eugene Tulchin

V. ISSUES IN COMPENSATION 75

A. MERIT PAY AND MARKET ADJUSTMENTS 77
Linda Tom

B. SALARY INCENTIVE SYSTEMS 81
William S. Brown

VI. BARGAINING WITH "NONTENURE TRACK" FACULTY 85

A. THE MASSACHUSETTS EXPERIENCE 87
Arlyn Diamond

B. THE CALIFORNIA EXPERIENCE 92
David Averbuck

C. THE CANADIAN EXPERIENCE 97
Ron Levesque

VII. CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE 101

A. A LEGAL ANALYSIS OF COLLECTIVE BARGAINING IN HIGHER EDUCATION 103
Woodley B. Osborne

B. THE MELANI SEX DISCRIMINATION CLASS ACTION SUIT 111
Joan Rome

VIII. THE DISCIPLINE OF FACULTY 115

A. THE ADMINISTRATIVE PERSPECTIVE 117
Joan Geetter

B. THE UNION PERSPECTIVE 124
Nuala M. Drescher

INTRODUCTION

The Fourteenth Annual Conference marked a certain passage of time for the National Center as it was the last conference in which Aaron Levenstein participated in before his death in July of this year. Aaron will be sorely missed on both a personal and professsional level. Each year as the Baruch Faculty Advisory Committee met to plan the annual conference, it was always Aaron that we looked to for ideas and guidance. Aaron always had a title, a speaker and a direction that we eventually incorporated into the program. His intelligence, warmth and willingness to work with us made my job so much easier and more enjoyable. This conference also marked the first for Beth Hillman who joined us as our new Administrative Coordinator. Institutions remain, individuals do not.

DESIGN OF THE CONFERENCE

This year's conference centered on an examination of unionized faculty in terms of several critical issues ever present at the bargaining table. The main plenary session concerned a reexamination of the entire system by Jack Schuster and Myron Lieberman. Schuster, along with Howard Bowen, had just completed American Professors: A National Resource Imperiled and served as one of two keynoters. Lieberman was asked to present his views on peer review and faculty self government; views not necessarily shared by the conference participants. Joining them in the keynote session were Barbara Lee and Clara Lovett. Lee, a well-known researcher in collective bargaining in higher education had served on the "NIE Study Group on the Composition of Excellence in Higher Education" and was able to bridge the gap between theory and practice. Lovett, a former Baruch administrator, had worked on the "AAHE Task Force on Professional Growth — Faculty Opportunities Audit" and presented her findings in this area. Together these papers established a conceptual framework from which the rest of the program was built.

Three problem areas were selected for small group discussion and analysis. These included, the aftermath of Yeshiva in private colleges, selected issues in faculty compensation and bargaining with "nontenure track" faculty. Concerning Yeshiva, we were fortunate in obtaining representatives from five colleges, including Yeshiva, that have been involved in litigation. The other institutions were Boston University, Cooper Union, Long Island University and Polytechnic Institute of New York. Since the conference was held, new decisions have been issued in Boston University and Cooper Union, however, no attempt was made to edit their speeches to reflect these changes. (For a complete update of Yeshiva, see NCSCBHEP Newsletter Vol. 14, No. 4).

The small group session on compensation focused on "Pay for Performance" and "Market Forces Salary Equity Adjustments". Representatives from unionized and nonunionized institutions presented their findings. A report on these issues, as currently implemented at the University of Delaware, Barnard College and Fisher Junior College, was presented. The third topic, "Collective Bargaining for 'Nontenure Track' Faculty", included presentations by academic unionists from AFT, NEA and CAUT. The AFT presentation concerned the difficulties in negotiating the initial Agreement at the University of California System in bargaining for a separate unit of "nontenure track" faculty and was contrasted with the experiences at the NEA Local at the University of Massachusetts where there is a single bargaining unit of full-time and part-time "nontenure track" faculty. In addition, this session also included a Canadian perspective.

6/7

Consistent with our commitment to the study of collective bargaining in the professions, two sessions focused on this topic. Representatives from Doctors' Council, Actors Equity, the New York Newspaper Guild and the AFL-CIO Department of Professional Employees took part in our plenary session entitled "How 'Other Professions' Bargain". This session afforded academics the opportunity to develop an appreciation of collective bargaining as practiced by other professionals. A separate session was devoted to "Labor Relations in Baseball". The speaker for that session was Don Fehr, the Executive Director and General Counsel for the Major League Baseball Players Association.

Two annual updates were presented — the "Collective Bargaining Update: 1986" and "Campus Bargaining and the Law". The legal update was presented by Jacqueline Mintz, AAUP Associate Counsel and, an old friend of the Center, Woody Osborne. Featured was a discussion of case law in employment discrimination, union security and unionized employment relationships. The collective bargaining update centered on agent elections, legislation, strikes and Yeshiva-related decertifications.

The final plenary session concerned the issue of "The Discipline of Faculty". This somewhat delicate issue was first suggested as a conference topic some five or six years ago, however, the lack of data in this area mitigated against a feature presentation. In recent years, new techniques for disciplining faculty have been developed and as a result, it was suggested that discipline now be addessed. Nuala Drescher of the UUP and Joan Geetter from the UConn presented their views and experiences.

THE PROGRAM

Set forth below is the progam of the Fourteenth Annual Conference. Some editorial liberty was taken with respect to format and background material in order to ensure readability and consistency. In those instances where the author was unable to submit a paper, while the name appears on the program, the remarks have been omitted.

MONDAY MORNING, APRIL 28, 1986

8:30 REGISTRATION AND COFFEE HOUR

9:30 WELCOME
Paul LeClerc, Provost, Baruch College, CUNY

COLLECTIVE BARGAINING UPDATE: 1986
Joel M. Douglas, Director, NCSCBHEP

10:30 PLENARY SESSION "A"
REEXAMINING THE SYSTEM: A CRITICAL REVIEW OF THE PROCESS

Speakers:

Jack H. Schuster, Assoc. Professor
Education and Public Policy
Claremont Graduate School, Co-Author, *American Professors: A National Resource Imperiled*

Barbara Lee, Asst. Professor
Inst. Mgt. & Labor Rels., Rutgers University, Member, NIE Study Group on Composition of Excellence in Higher Education

Myron Lieberman, Professor
Ohio University

Clara M. Lovett, Dean
Columbian College of Arts & Sciences
George Washington University

Moderator/Discussant Paul LeClerc

1:00 LUNCHEON

Topic: LABOR RELATIONS IN BASEBALL

Speaker: Donald M. Fehr, Executive Director
and General Counsel, Major League
Baseball Players Association

Presiding: Joel M. Douglas

MONDAY AFTERNOON, APRIL 28, 1986

2:30 SMALL GROUP SESSIONS

2:30 GROUP "A"
BARGAINING IN PRIVATE COLLEGES IN THE AFTERMATH OF *YESHIVA*

Speakers: Ralph Behrends, Professor
Yeshiva University, former Chair
Faculty Steering Committee

Marvin Gettleman, Professor
Polytechnic Institute of NY
Secretary of Faculty

David Newton
Executive Vice President
Long Island University

Michael Rosen
Associate General Counsel
Boston University

Eugene Tulchin, Professor
V. P., C.U. Federation of College
Teachers, Cooper Union

Moderator: Stephen Finner
Assoc. Director of Collective
Bargaining, AAUP

2:30 GROUP "B"
ISSUES IN COMPENSATION

Speakers: William S. Brown
Director of Personnel
Barnard College

Brian Donnelly
President
Fisher Junior College

Linda Tom
Director of Employee Relations
University of Delaware

Moderator: Arnold Cantor
Executive Director
Professional Staff Congress/CUNY

2:30 GROUP "C"
BARGAINING WITH "NONTENURE TRACK" FACULTY

Speakers: Ron Levesque
Acting Executive Secretary
Canadian Association of University Teachers

David Averbuck, Lecturer
Univ. of California
Northern Vice President
University Council, AFT

Arlyn Diamond, Assoc. Professor
English and Women's Studies, U. Mass.
Pres., NEA Local, Mass. Society of Professors

Moderator: Beverly F. Sowande
Associate Professor
Hunter College, Chapter Chair/PSC

TUESDAY MORNING, APRIL 29, 1986

9:30 PLENARY SESSION "B"
CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE

Speakers: Jacqueline W. Mintz, Esq.
Associate Secretary and Associate Counsel, AAUP

Woodley B. Osborne, Esq.
Spec. Counsel Higher Education, AFT
Friedman & Wirtz, Washington, DC

Moderator/Discussant: Joan Rome, University Director
Instructional Staff Labor Relations
CUNY

11:15 PLENARY SESSION "C"
HOW "OTHER PROFESSIONS" BARGAIN

Speakers: Barry Liebowitz
President, Doctors' Council
Clinical Asst. Prof., Downstate, SUNY

Dick Moore
Editor of Equity News and
AFTRA Magazine

Peter McGloughlin, Local Chairperson
New York Newspaper Guild
Reporter, New York Daily News

Jack Golodner, Director
Department of Professional Employees,
AFL-CIO

Moderator/Discussant: Joseph Hankin
President
Westchester Community College

1:00 LUNCHEON SYMPOSIUM

Topic: THE DISCIPLINE OF FACULTY

Speakers: Nuala M. Drescher, Professor
SUNY, Buffalo, Pres., UUP/AFT
Local 2190, SUNY

Joan Geetter, Asst. Vice Pres.
for Academic Affairs
University of Connecticut

Moderator: Joel M. Douglas

3:30 SUMMATION AND ADJOURNMENT

Joel M. Douglas

A WORD ABOUT THE NATIONAL CENTER

The National Center is an impartial, nonprofit educational institution serving as a clearinghouse and forum for those engaged in collective bargaining (and the related processes of grievance administration and arbitration) in colleges and universities. Operating on the campus of Baruch College, City University of New York, it addresses its research to scholars and practitioners in the field. Membership consists of institutions and individuals from all regions of the U. S. and Canada. Activities are financed primarily by membership, conference and workshop fees, foundation grants, and income from various services and publications made available to members and the public.

Among the activities are:

- The two-day Annual Spring Conference
- Publication of the Proceedings of the Annual Conference, containing texts of all major papers.
- Issuance of an annual Directory of Faculty Contracts and Bargaining Agents.
- An annual bibliography, Collective Bargaining in Higher Education and the Professions.

- The National Center Newsletter, issued five times a year, providing in depth analysis of trends, current developments, major decisions of courts and regulatory bodies, updates of contract negotiations and selection of bargaining agents, reviews and listings of publications in the field.

- Monographs — complete coverage of a major problem or area, sometimes of book length.

- Elias Lieberman Higher Education Contract Library maintained by the National Center, containing more than 350 college and university collective bargaining agreements, important books and relevant research reports.

- Depository of arbitration awards in higher education housed at the National Center and established with the cooperation of the American Arbitration Association.

ACKNOWLEDGMENTS

The publication of the Annual Proceedings is a combined project of all of us at the Center. Ruby N. Hill had the major responsibility of putting edited speeches into final form. Beth Hillman who saw this conference through from its inception to culmination coordinated the various production aspects of this project. In addition, Beth also assisted me with copy editing and was responsible for all proofreading. Elisabeth Kotch and Stephen Bryan took part in the proofreading. Jeannine Granger did an admirable job in transcribing speeches from audio tapes. As always, the preparation of the Proceedings was a group effort: I am indeed fortunate that the group performed up to its usually high standards. As I have stated on previous occasions, for any errors or omissions, we apologize. For the success of this project, I gratefully acknowledge the above.

J. M. D.

II. REEXAMINING THE SYSTEM: A CRITICAL REVIEW OF THE PROCESS

A. THE EVOLVING FACULTY CONDITION: WHAT IS THE RELEVANCE TO THE COLLECTIVE BARGAINING COMMUNITY?

B. PEER REVIEW AND FACULTY SELF GOVERNMENT: A DISSENTING VIEW

C. CAMPUS REALITIES: IS COLLECTIVE BARGAINING EQUIPPED TO DEAL WITH THEM?

D. THE FACULTY OPPORTUNITIES AUDIT

REEXAMINING THE SYSTEM: A CRITICAL REVIEW OF THE PROCESS

A. THE EVOLVING FACULTY CONDITION: WHAT IS THE RELEVANCE TO THE COLLECTIVE BARGAINING COMMUNITY?

Jack H. Schuster, Associate Professor
Education and Public Policy
Claremont Graduate School

INTRODUCTION

Over the past year and a half, the nation has witnessed an out-pouring of books and reports relevant to the faculty. Some have centered on the undergraduate curriculum; in them, the role of the faculty in curricular reform is repeatedly criticized. Other studies directly address the faculty condition itself. My purpose is to place, in clearer perspective, the findings and recommendations reported in this melange of studies. In so doing, first, I shall emphasize the conclusions drawn from the research in which I have been engaged with my colleague, Howard Bowen, over the past several years. Then, I shall speculate about implications of these findings for those who have a particular interest — as scholars, administrators or faculty — in faculty unions.

PREDICAMENTS CONFRONTING FACULTY

These are perplexing times for faculty members caught up in a volatile period for higher education and the academic profession. Of course, perspective is important. Some eras surely more stressful, more volatile, more replete with challenges than others. Consider, by way of context, that in recent years colleges and universities have been bombarded by a succession of reports that have scrutinized American higher education more closely than any time in decades.[1] Moreover, this barrage has come at a time when most of our colleges and universities have been obliged to do their jobs as best they can with relatively fewer resources than they had become accustomed to.

In the aggregate, these reports have informed us that the American undergraduate curriculum has come unglued and requires not just patching up but basic reconceptualization and reorganization. We are advised that the faculty is frustrated. We are told that few college presidents, and even fewer faculty members, engage in educational leadership on their own campuses. Most of these reports have something to say about the performance of faculty members. Indeed, the faculty is receiving many messages which together have the effect of subjecting faculty members to an intensive crossfire. "Restore a cohesive, integrated curriculum, one grounded in the traditional liberal arts," urges one set of critics. "The undisciplined cafeteria line of courses can be tolerated no longer." "And while you're at it," other critics implore, "reemphasize the urgency of inspired teaching. You must somehow find better ways to motivate undergraduates preoccupied with careerism." "Yes, of course, teaching is important," still other critics enjoin, "but mere teaching will no longer suffice here for retention, promotion and tenure. Productivity! Yea, articles in refereed journals, monographs and books — there will be found this campus' rejuvenation and fame."

Still other voices, including the prestigious Business-Higher Education Forum of the American Council on Education, warn us: "Behold, the American economy is losing ground to foreign competitors, and higher education must better train a new generation of economic warriors." Their prescription, predicated on the nation's economic vulnerability, is to encourage tighter linkages between universities and industry; in so doing, they espouse a more narrow, instrumental view of higher education as a means to enhance the nation's ability to compete effectively in the global economic "wars".

Further still, some skeptics, including a host of public officials, entreat faculty members to be more committed to the urgent need to expand access to higher education and if that means providing more and more remedial education, then so be it.

Yet at the same time, the faculty is routinely rebuked for compromising academic standards by tolerating slothful students whose academic skills are woefully inadequate and whose intellectual interests are, to put it mildly, hard to ascertain.

The faculty is entitled to seek a short moratorium and to inquire: Can America's faculties legitimately be expected to reform the curriculum, rejuvenate teaching, increase scholarly productivity, tighten the linkages with industry, expand access and promote rigor? And, not merely are they being asked to accomplish all those things, but to do so simultaneously and with demonstrably too few resources. This is not an easy assignment that has come the faculty's way.

If I am able to help us place, in better perspective, the predicaments that confront the faculty, I believe I will have accomplished a useful purpose. Most assuredly, whatever I have to say will not dispel faculty frustration nor squelch professorial grousing; in that regard, the faculty reserves its rights. There is, after all, more than a little truth in the observation of Christopher Jencks and David Riesman who wrote two decades that "Academics are neither a tolerant nor an easy-going species." Their "feelings of irritation and frustration," they suggested, are "apparently congenital."[2] In a similar vein, Stephen K. Bailey, a distinguished political scientist and a leading authority on higher education politics, once noted that campuses are "incubators of anxiety".[3] So we, too, acknowledge faculty members' propensities.

THE WELL-BEING OF THE FACULTY

To delve beyond the rhetorical flourishes to ascertain the reality of the faculty condition, I now proceed with four themes:

> First, the condition of the faculty — its quality, well-being and morale — is central to the university's ability to accomplish its tasks.
>
> Second, the observable condition of the American professoriate has deteriorated significantly in recent years.

Third, faculty morale is weak, a condition exacerbated by rapidly shifting campus values that are contributing to discord and frustration on many campuses.

Fourth, the changing condition of the professoriate has important implications for collective bargaining in academe.

FOUR CRITICAL ISSUES

Proposition No. I. Faculty Crucial to Higher Education's Missions

I will dwell but for a moment on the first proposition, namely, that the well-being of the faculty is critical to the ability of a college or university to carry out its missions successfully. Without going to the extreme of asserting that "the faculty is the university," we must recognize that the talent, training, vitality, and social conscience of the faculty are critical ingredients of the ability of each college or university to accomplish its major tasks. Accordingly, the main duty of every institution of higher education is to place a competent faculty, and the scholarly environment they create, at the disposal of students, and to provide the resources and encouragement needed by that faculty to meet their teaching, research and public service responsibilities.

Let us bear in mind that the nation's faculties are entrusted with the education of about a third to a half of every age cohort of young people, and they touch the lives of millions of other persons in less intensive encounters. They train virtually the entire leadership of the society in the professions, government, business, and, to a lesser extent, the arts. They train the teachers, clergy, journalists, physicians, and others whose main function is to inform, shape, and guide human development. The nation depends upon the faculties also for much of its basic research and scholarship, philosophical and religious inquiry, public policy analysis, social criticism, cultivation of literature and the fine arts, and technical consulting. The faculties, through both their teaching and research, are enormously influential in the economic progress and cultural development of the nation. In short, the faculties are a major influence in shaping the destiny of the nation, and the nation has a clear and urgent interest in assembling and maintaining faculties having adequate numbers of talented, well-trained, highly motivated, and socially responsible people. These contentions, I submit, are self-evident, but they constitute a necessary point of departure.[4]

Proposition No. II. The Decline of the Faculty Condition

This leads to my second proposition that over the past decade and a half, the conditions in which faculty members find themselves have deteriorated significantly.

I have been engaged, over the past several years, with my distinguished colleague at Claremont Graduate School, Howard Bowen, in a study of the condition of the American professoriate. This project, which Professor Bowen conceived, was generously supported by the Carnegie Corporation of New York, the Ford Foundation and the Exxon Education Foundation.

Our endeavor has been ambitious. We attempt to provide a detailed profile of today's college and university faculty members, with emphasis on how their characteristics have changed since around 1970. We try to bring together the relevant evidence that bears on the status of faculty compensation and conditions in the work environment. In addition, our book reports findings drawn from 532 interviews conducted at a sample of 38 colleges and universities of all types. We engage also in academic marketplace projections, estimating the number of new hires and departures from the profession over the next 25 years. We conclude our book with numerous recommendations directed at government and at institutions of higher education themselves.

While it is not possible to describe our findings in detail or to develop adequately the evidence on which we base them, I do want to set forth several of the salient findings. I will comment on two such conditions.

A. First, the work environment. Across the nation, we found faculty working conditions to be deteriorating steadily, from the reduced availability of secretarial and clerical support to declining budgets for libraries and research instrumentation, from the quality of ill-prepared students to sharply reduced budgets for faculty travel, from cramped office space to an enormous backlog of campus deferred maintenance projects to a host of well-intentioned campus programs for faculty evaluation that have sometimes been conducted with far too little sensitivity. In too many instances, faculty concerns have been subordinated to those of other worthwhile campus claimants in the competition for perennially scarce resources.

B. Faculty compensation is a second factor. Expressed in terms of real earnings adjusted for inflation, compensation for college and university faculty has dropped sharply — about 14 percent since 1970. In fact, this constitutes a steeper drop than that experienced by any other major non-agricultural occupation group. At least one commentator has suggested, not without some basis, that current trends in faculty compensation, if unchecked, will submerge lower ranking assistant professors into the category of "working poor" within the foreseeable future.[5] It is true that the bleeding may have been staunched over the past five years, with modest gains now evident, including a 2.5 percent increase vis-a-vis inflation for 1985-86.[6] Even so, faculty compensation remains far below historic highs, and the oversupply of faculty in most fields augurs poorly for faculty compensation over the next decade.

Proposition No. III. Weakened Faculty Morale

The third proposition holds that faculty morale is weak and that this condition is exacerbated by rapidly shifting values on many campuses.

Let it be understood that ascertaining and interpreting the true mood of the faculty is no picnic. Neither sensitive interviewing nor broad-based questionnaires can avoid distortions by faculty members who may be motivated "to send a message". Moreover, we must not lose sight of the fact that there is no such thing as "the faculty," except in the most general sense; the variations — among 3,100 campus settings and the almost seven hundred thousand faculty members who work there — are daunting. Nonetheless, some generalizations are justified.

Poor faculty morale is attributable, in no small measure, to the conditions already described: deterioration in the quality of the work environment and the faculty's sharply reduced earning power. Other factors bear on faculty morale, as well. To mention but two, the decline of faculty mobility, compared to the situation that prevailed until the 1970's, has contributed to a sense of "stuckness". Further, we found many faculty members to be disgruntled over campus differential pay policies whereby faculty in high demand fields at many campuses are being paid more than faculty in fields for which student demand is soft; differential pay has always existed, but not nearly to the extent that now obtains.

We found also that the reward structure on many campuses is shifting. Numerous campuses are insisting on scholarly productivity, not merely effective teaching, as a prerequisite for retention, promotion, and tenure. These changes have led to heightened anxieties and sometimes result in considerable ill will among faculty members.[7]

All of these factors, among others, contribute to a level of faculty morale that leaves much room for improvement. In all, we found some faculty morale to be reasonably good at only a third of the campuses we visited. In the main, these exceptions are found among the stronger research universities and the more selective liberal arts colleges. At those relatively fortunate institutions, faculty esprit appears to be, on the whole, good, and even excellent at one campus. At the same time, faculty morale at most of the institutions we visited — 25 of the 38 — ranges in our estimation from fair to poor to very poor.

We concluded that, all in all, the faculty tends to be dispirited. While our findings suggest neither a dramatic shift in faculty morale in recent years nor a uniformly bleak outlook, we did find widespread anxiety and apprehension. Perhaps the best single descriptor of faculty morale is "shaky".

We also found evidence that the academic profession is losing its ability to compete successfully with other professions and occupations — particularly law, medicine and business — in attracting the very ablest young people to academic careers.

As it happens, our findings about the faculty condition appear to be consistent with those recently reported by Ernest Boyer of the Carnegie Foundation for the Advancement of Teaching.[8] I find the convergence of these findings, from independent studies using different research methodologies, to be both reassuring and disturbing — reassuring in the sense that I am more confident than ever that Howard Bowen and I did not overstate the seriousness of the faculty's circumstances, but disturbing, as well, because the faculty condition, thus depicted, calls for a potent remedy — at a time when remedies are not easy to come by.

Proposition No. IV. Implications for Collective Bargaining

Turning now to the fourth and final theme, I will suggest what I see as the implications of our findings for the world of faculty collective bargaining. Before I do so, I should establish the basis for my observations.

As indicated earlier, our study draws, in part, on visits to 38 campuses. We tried hard to build a reasonably representative sample of campuses, although it should be obvious that no combination of 38 could adequately represent the rampant diversity of higher education institutions. Nonetheless, one factor entering the sampling process was whether or not the faculty was represented by an exclusive bargaining agent. This led us to select a subset of ten campuses—nine public and one private — whose faculties were organized.[9] Six of the ten were community colleges. Of these, three faculties were represented by the AFT: City College of San Francisco, Henry Ford Community College in Dearborn, Michigan, and Joliet Junior College in Illinois. The faculty at the Rockville Campus of Montgomery College in Maryland was represented by the AAUP, and the NEA was the agent for the faculty at Cypress College in California. At Borough of Manhattan Community College, the Professional Staff Congress, affiliated with the AFT and the AAUP, represented the faculty. The four four-year institutions with faculty unions were Jersey City State College (AFT), Southern Connecticut State College (AAUP), and California State University, Los Angeles, represented by the California Faculty Association with ties to the NEA and AAUP. At the Pratt Institute, the only non-public campus among our ten with faculty unions, the AFT is the agent.

Among the more than 500 interviews with academic administrators and faculty members were the heads of campus locals and chairs of faculty senates. I must underscore the fact that union-related issues did not comprise a substantial part of our inquiry. In fact, only two among our 32 interview questions dealt directly with faculty union activity. We sought to examine the consequences of unionization when interesting comments arose, and the relationship of the union to the faculty condition was explored at greater length in interviews with faculty members or administrators who were directly involved in the processes of bargaining or contract administration. To repeat, however, the topic of unionization was not central to our inquiry. Accordingly, the following observations are based on scattered evidence.

ISSUES RELEVANT TO FACULTY UNIONIZATION

First, relations between the parties, though not exactly cordial, were essentially stable. Situations on these ten campuses varied considerably from one campus to another, and therefore, generalizations are hazardous. All in all, the relationships we found between the administrations and the faculty unions appeared to be reasonably stable. While we did not discover a great deal of open hostility, neither did we find perfect harmony. Faculty union leaders predictably would cite long lists of grievances about administrative autocracy and general malfeasance. And some administrators, tending toward more caution in their comments, nonetheless alleged egregious conduct by faculty unions. But the overall flavor of the relationships, across the ten campuses, was one of mutual acceptance. I sensed less of an adversarial, confrontational mode than I had expected. In sum, my impression was one of growing maturity in the relationship between the parties.

This evidence of stability should not be interpreted to mean that relations between administrators and unions were, on the whole, cordial. That would be going too far. On most campuses, there was ample antagonism between the two; on several of the campuses, the relationship between the parties could best be characterized as hostile. Even so, our overall sense was that the parties had at least reconciled themselves to the necessity of coexistence. Fondness for one another, however, would have to await a new dawn.

Second, low faculty morale presages growing tensions on campuses. A great many faculty members we interviewed appeared to be very frustrated — a point made earlier when discussing faculty morale. But what does this mean? How much should this frustration be discounted as a "natural" state of affairs for academics? Recall the observations of Jencks and Riesman and Bailey cited earlier: faculty are perhaps naturally disposed to be critical of their circumstances. There probably never has been, nor will be, a contented faculty, or, perhaps more accurately, a faculty disposed to concede that all is basically well. Moreover, we make clear in our book that very few academics, to this point, are voluntarily leaving campuses. Almost any academic can cite an example or two of a former colleague who "defected" allegedly because of frustrations and/or inadequate compensation. But not only are instances of sociologist-turned-restauranteur uncommon, they are rare — except in several fields in which faculty still retain exceptional mobility. Accordingly, we may well wonder whether there is a bite that may follow the high-decibel barking.

Making allowances for the imperfections of our methodology, my strong impression is that many faculty are dispirited. My assessment is that the faculty at many campuses perceive themselves to be victims of circumstances which they cannot adequately influence. I suspect they will become more cantankerous and more determined to protect eroding prerogatives from administrators-turned-managers and from intrusive extra-campus forces.

Third, I suspect that our ten unionized campuses constituted a microcosm of contemporary academic collective bargaining. Many of the issues encountered in the literature or in my previous study of collective bargaining were evident on one campus or another. I do not view our findings as uncovering new insights into the dynamics of collective bargaining in postsecondary education but rather primarily as confirming findings amply reported in the literature.

Thus my fourth point: faculty members at unionized campuses tended to emphasize the union's effectiveness in protecting the faculty against arbitrary administrative action. The union was frequently seen as a reasonably effective mechanism for checking administrations poised, in the perception of some faculty members, to take advantage of a faculty already on the defensive. One bargaining unit member, the chair of a history department at a state college, declared, "A union is almost a necessity in this day and age." A community college faculty member proclaimed that, "The faculty union is a positive thing....It gives you a sense of power. You are not totally at the mercy of the administrators and the Board of Trustees." A dean at a four-year institution suggested that, "The union has given (the faculty) many powers and taken away all capability of the institution to be arbitrary and capricious." Underscoring the fact that the local conditions vary, a social scientist at another community college saw just the opposite effect: "The contract is a bad one," she said. "It gives the administration supreme power." But that view was an exception; most faculty felt that the union had been helpful in preventing administrations from usurping still more power.

Fifth, the faculty at these institutions appeared to use the union to protect the interests of the regular full-time faculty. This objective was realized, in part, by protecting relatively high salaries through assuring overload teaching opportunities and by using part-time faculty to achieve institutional economies. The result, it appeared, was to give the faculty a greater sense of security and well-being. And faculty members are, understandably, worried about job security. While separations of tenured faculty have been infrequent, it is relevant to note that the number of faculty members has begun to drop and may well decline around 9 or 10 percent between the peak year 1982-83 and 1993-94 (see Table 1).

Sixth, compensation was a silent issue at most of these ten campuses. The most commonly expressed sentiment was frustration, sometimes even bitterness, over inadequate compensation. In the words of an associate professor at a state college: "It's a drag, to have to live in apartments and to worry about raising a family living on this salary." Despite widespread complaints about salaries at most campuses, compensation did not emerge as an issue at several of the community colleges where salaries appeared to be quite attractive, even before overload and summer teaching were taken into account. Indeed, the head of one union local boasted that, "The salaries are incredible!" And he did not mean that salaries were too low!

To this general observation about compensation should be added a further reference to the increasingly common practice of differentiating salaries in accordance with market conditions. The point was made earlier that differential pay practices angered a considerable number of faculty members with whom we spoke. Recognizing that such policies are less likely to be found in unionized campuses, those engaged in the collective bargaining process might well ponder the significance of such expressions of outrage about a practice that blatantly proclaims some faculty members to be "worth more" than peers in fields in which demand is softer.

Seventh, I am covinced that administrators can ease campus tensions and assuage at least some bruised feelings simply by being more sensitive to the psychological needs of anxious, demoralized faculty members who are feeling unappreciated. It is my view that administrators from presidents to department chairs can be more effective in demonstrating their support for faculty efforts:

> ...the crucial elements are providing recognition, showing appreciation, and promoting faculty self-esteem. In this regard, a small investment of an administrator's time can pay off handsomely; it is, according to a graduate dean, a matter merely of "the small trouble it takes to recognize people who are doing something." A president commented that it is almost as simple as patting people on the back. One biologist emphasized the importance of instilling the faculty with "a sense of their worth." Stated differently, it is the need to foster in faculty members a sense of their contribution to the whole picture. Perhaps the formulation proffered by a history chair at a state university best sums up the administrative opportunity and responsibility; in his prescription the administrative task is to impart to faculty "a feeling of being needed and respected."[10]

Finally, our basic findings do not portend fundamental changes for the bargaining process. The existence of widespread disgruntlement and anxiety among bargaining unit members does not basically alter the power relationship between the parties. The attitude of the bargaining agent may be different — will be different — because of a more threatening environment. While the relationship between the parties may be tense, that relationship is influenced so much by the strong buyers' marketplace that bargaining outcomes are not likely to be significantly affected.

TABLE 1

Number of Faculty, Rank of Instructor or Above, in Institutions of Higher Education, Selected Years (in thousands)

Fall	Full-Time	Part-Time	Total	Full-time Equivalent(a)
1970	369	104	474	404
1983(b)	457	245	702	539
1985(c)	454	240	694	534
1993(c)	415	220	635	488
Pct. Change(d)	-9.2	-10.2	-9.5	-9.5

Source: Derived from The Condition of Education, Valena White Plisko and Joyce D. Stern, eds. (Washington: National Center for Education Statistics, U.S. Dept. of Education, 1985 ed.), Table 2.12, p. 110.

(a) Calculated by adding one-third of part-time faculty to full-time faculty

(b) Estimated on basis of enrollments

(c) Projected

(d) Percent change (est.) from peak year 1983 to 1993

[1] The three most widely publicized reports to date have been: Study Group on the Conditions of Excellence in American Higher Education, Involvement in Learning: Realizing the Potential of American Higher Education (Washington: National Institute of Education, U.S. Department of Education, October 1984); William J. Bennett, To Reclaim a Legacy: A Report on the Humanities in Higher Education (Washington: National Endowment for the Humanities, November 1984); Association of American Colleges, Integrity in the College Curriculum: A Report to the Academic Community (Washington: Association of American Colleges, February 1985).

[2] Christopher Jencks and David Riesman, The Academe Revolution (New York: Basic Books, 1968), p. 17.

[3] Stephen K. Bailey, Chronicle of Higher Education, May 28, 1974.

[4] See Howard R. Bowen and Jack H. Schuster, American Professors, pp. 3-4.

[5] W. F. Abbott, "Commentary: When Will Academicians Enter the Ranks of the Working Poor?" Academe, Oct., 1980, pp. 349-353.

[6] Jean Evangelauf, "Professors' Salaries Increase 6.1 Pct., Average $33,090," Chronicle of Higher Education, April 2, 1986, pp. 1, 25; W. Lee Hansen, "Continuing the Upward Climb: The Annual Report on the Economic Status of the Profession, 1985-86," Academe, March-April 1986, pp. 3-19.

[7] For a more complete discussion of this point, see Bowen and Schuster, op cit., pp. 146-152 and Schuster and Bowen, "The Faculty at Risk", Change, Sept.-Oct. 1985, pp. 17-21.

[8] See Carnegie Foundation for the Advancement of Teaching, "Change Trendlines," Change, Sept.-Oct. 1985, pp. 31-34 and March-April 1986, pp. 31-34. See also Robert L. Jacobson, "Nearly 40 Pct. of Faculty Members Said to Consider Leaving Academe," Chronicle of Higher Education, Oct. 23, 1985, pp. 1, 22.

[9] Ten campuses constitute 26 percent of our sample of 38 campuses, a figure roughly comparable to the proportion among all campuses where the faculty is represented by bargaining agents. In addition to the ten, the law school faculties at Fordham and New York University bargaining units have been designated for but, to my knowledge, have never sought to negotiate a contract. Finally, at American University, a small number of faculty members are represented by an independent agent.

[10] Jack H. Schuster, "Faculty Vitality: Observation from the Field," in Roger J. Baldwin, ed., Incentives for Faculty Vitality (New Directions in Higher Education, No. 51) (San Francisco: Jossey-Bass, 1985), p. 26.

REEXAMINING THE SYSTEM:
A CRITICAL REVIEW OF THE PROCESS
B. PEER REVIEW AND FACULTY SELF GOVERNMENT: A DISSENTING VIEW

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INTRODUCTION

This article is a critique of "Peer Review" (hereinafter PR) and Faculty Self Government (hereinafter FSG). My view is that as practiced in higher education in the United States, "Peer Review" and Faculty Self Government are a major cause of the pervasive weaknesses found in the system. PR and FSG contribute to the excessive costs, waste, intellectual and moral hypocrisy, and the overriding failures of higher education to fulfill its social function. As I shall try to explain how these weaknesses, which characterize both public and private higher education, are the inevitable consequences of the procedures to be analyzed.

THE PROCESS OF "PEER REVIEW"

Although PR and FSG often overlap in practice, they can be distinguished. "Peer review" is a procedure in which the conduct of faculty members is subject to review by his or her "peers". Conceptually, PR can be applied to a variety of evaluative decisions or recommendations. In practice, it is used primarily in personnel and research decisions. With respect to personnel decisions, "peer review" often comes into play when a faculty member is being considered for tenure, promotion, and/or salary increases. It is also used in some institutions in dismissal or disciplinary proceedings. In the research area, "peer review" is frequently used to access grant or contract proposals. Federal legislation in some areas mandates "peer review" as part of the grant or contract-making procedure.

Inasmuch as a major criticism of "peer review" and faculty self government will be their lack of accountability, let me clarify the term accountability as I shall use it. I regard an individual as accountable to the extent that the individual is subject to rewards and/or penalties for the quality of his own conduct, decisions, or recommendations. In this connection, three points must be emphasized. First, "decisions" include decisions to recommend i.e., recommendations. Secondly, the fact that a faculty decision may not be accepted by higher authority is not critical. In my view the absence of legal authority should not absolve faculty of accountability for the quality of their recommendations. Finally, accountability is personal. That is, a person should be held accountable only for his own actions. It would hardly make sense to hold a faculty member accountable for a decision which he opposed. Meaningful accountability is not possible under a decision-making system unless the system enables us to identify and assess individual roles in the decision-making process.

To be accountable, individuals must run the risk of adverse personal consequences as the result of poor recommendations or poor decisions. To illustrate, if a dean recommends individuals for academic employment, the dean can be held accountable for the performance of the persons recommended. If a dean consistently employs poor teachers who never conduct any significant research, the appropriate authorities can legitimately conclude that the dean has not performed adequately.

In order for a faculty member to be accountable for the quality of their decisions, recommendations must also be taken into account. In practice, however, this is not done. I know of no institution in which faculty members are accountable for their recommendations as "peers". When the issue is raised, a typical response is that the faculty members are accountable because they too would share in any institutional decline resulting from poor recommendations.

This concept of accountability seems unique to higher education. If a professional football player misses blocks and drops passes the player experiences adverse consequences. Coaches do not say, "You missed your blocks and dropped your passes but because you also suffered, because we ended up in last place, I will not trade you, drop you from the team or reduce your compensation." In any other field, this system of collective accountability would just be perceived for what it is, an absurdity.

PR AND THE PERSONNEL PROCESS

Let us now consider PR in the personnel process. Typically, a faculty member being considered for tenure, promotion or salary increase is subject to peer review". Yet who are the "peers"? In practice they are the other faculty members. Frequently when the decisons involve tenure and/or promotion the "peers" are faculty who already have tenure and rank; in effect, "peer review" means that those who were hired first decide who will be hired second. Whether those first hired, or first accorded tenure are "peers" from a professional standpoint is strictly a matter of chance. The meaning of "peer" is not raised as an issue although the vagueness of the concept literally begs for clarification. Obviously, it would be extremely difficult for an individual subject to "peer review" to raise the issue. To see why, suppose X is an outstanding historian. Suppose also that X is up for tenure, and is being considered by history professors of less achievement and promise. We can hardly expect X to challenge the qualifications of his "peers" since the latter have the power to deny tenure. Furthermore, most professors have strong reasons to avoid intra-departmental comparisons and evaluations. Not even the most secure professor is likely to say: "'Peer' should mean something different from the mere fact of prior employment. Let's separate the sheep from the goats or the 'peers' from those of lesser qualification in the department."

Let us approach the underlying issue from another perspective. Is a decision right because it is made by the faculty or is it right independently of who makes it; i.e., because it is consistent with various criteria. "Peer review" and faculty self government are based on the indefensible view that decisons are right because they are made by the faculty. After all, if it were otherwise, if faculty or "peer" decisions are right because of independent standards, two questions arise: Why can't an administrator adhere to these standards? Why assume that faculties are more likely than administrators to adhere to them, especially if the administrator is accountable for his recommendations and faculty are not?

PR AND COLLECTIVE OUTCOMES

Accountability does not exist merely because an institution may suffer as a result of poor recommendations, or even because the person making them may suffer indirectly from such decline. A general is accountable if decisions on his own status are based upon the quality of his conduct as a general. We would hardly shield generals from accountability merely because their nation might lose the war if they make mistakes. In contrast, faculty accountability under "peer review" and faculty self government is viewed solely as a collective outcome; professors regard themselves as accountable under collective decision-making because they too would allegedly suffer if their collective decisions are poor ones. In the real world faculty members are often better off as a result of decisons or recommendations that harm their institutions. Unfortunately, "peer review" and faculty self government ignore such possibilities frequent as they are.

EXTERNAL "PEER REVIEW"

Some institutions require outside evaluations in making important personnel decisions. For instance, if a professor is being recommended for tenure, the institution may require a certain number of favorable assessments from outside the institution. Ideally, the outsiders are prestigious individuals in the field.

Although the procedure can be easily abused (by illiciting outside assessments certain to support the views of the recommending authority), I see nothing inherently wrong in this procedure. In fact, it may safeguard against academic inbreeding or on-site "peer" approval to avoid unpleasant confrontations. As a matter of fact, I know of instances in which faculty members voted in favor of tenure, on the supposition that the dean and the outsiders would recommend denial of it. No one knows how often such things happen, but common sense suggests that such occurrences are not rare; the widespread concern over the confidentiality of "peer review" certainly points in this direction.

Whether outside review should be mandatory is another matter. The critical issue is the status of the outside assessments. If they are to be used at the discretion of the decisionmaker(s), I see no objection; if, however, an institution requires favorable outside assessments, we have "peer review" in a different but essentially irresponsible mode. This is evident if the question is raised: What is the accountability of the outsiders for the quality of their assessments? As a practical matter, there is none regardless of whether the outsiders are paid for their assessments. Whether their assessments are on or off target, or whether paid for or not, the outsiders do not experience any adverse consequences personally for horrendous assessments.

Accountability is not the same as hindsight. It should be based upon what individuals knew and should have known when they acted, not upon the actual consequences of their decisions. Patients often die even when receiving medical care from the most confident and conscientious physicians. Of course, one personnel decision that turns out badly may not justify adverse action against the decisionmaker, whereas a pattern of such decisions might well do so.

The proponents of PR and FSG assume that faculties are more likely to be immune from the bias, favoritism and conflicts of interest that presumably characterize other decision-making procedures. An incident that occurred at the City University of New York (CUNY) some years ago illustrates the fatuity of this assumption. The proportion of tenured faculty was getting so high that the trustees were finding their personnel, and hence programmatic options, too limited. Consequently, the CUNY trustees adopted a policy that required special justification for awarding tenure in academic units in which over 50 percent of the faculty already had tenure. The purpose of the policy was to preserve programmatic flexibility for the trustees.

The adoption of the policy resulted in drastic changes in personnel recommendations by "peer" groups. Recommendations to hire outside faculty with tenure, or close to eligibility for tenure, dwindled drastically. As a matter of fact, some recommendations of this sort that were already in the pipeline were recalled. Obviously, if new faculty were being recommended on the basis of competence, or university needs, such changes would have been inexplicable. On the other hand, the changes were consistent with the assumption that professors are motivated in significant part by self interest.

Professorial self interest is actually manifested in a variety of ways under "peer review". Sometimes faculty members do not want academic competition from colleagues; they prefer new faculty who will not be a threat to established faculty for promotions, salary increases, or consulting assignments. It is easy to conceal such motivations, especially when "peer review" operates behind a cloak of secrecy.

If one assumes, as I do, that what makes academic or personnel decisions right, is not who makes them, but whether the decisions conform to certain standards or objectives, the rationale for "peer review" is suspect indeed. On what basis can a person appeal a decision made by peers? Presumably only because the decision did not conform to some standard. They were allegedly based on bias or faulty judgements of competence, whatever. But if an appeal from "peer review" can be based on such criteria, what is the need for "peer review"? An individual administrator instead of the "peer" group could make the decision. If such decisions did not meet the appropriate criteria, they could be appealed just as the peer group decision could be appealed.

FACULTY SELF GOVERNMENT

Let me turn briefly to faculty self government. Whereas "peer review" can be applied to discrete decisions, faculty self government refers to a governance structure in which the faculty formulates policy and makes the critical personnel decisions.

The Rationale for Faculty Self Government

According to a statement issued jointly by the American Council on Education, the Association of Governing Boards of Universities and Colleges, and the American Association of University Professors:

> The faculty has primary responsibility for such fundamental areas as curriculum, subject matter, and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. On these matters the power of review or final decision lodged in the governing board or delegated by it to the president should be exercised adversely only in exceptional circumstances and for reasons communicated to the faculty.... Faculty status and related matters are primarily a faculty responsibility; this area includes appointments, reappointments, decisions not to reappoint, promotions, the granting of tenure, and dismissal.... Determination in these matters should first be by faculty action through established

> procedures, reviewed by the chief academic officers with the concurrence of the board. The governing board and the president should, on questions of faculty status, as in other matters where the faculty has primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail.
>
> Agencies for faculty participation in the government of the college or university should be established at each level where faculty responsibility is present. An agency should exist for the presentation of the views of the whole faculty. The structure and procedures for faculty participation should be designed, approved, and established by joint action of the components of the institution. Faculty representatives should be selected by the faculty according to procedures determined by the faculty. The agencies may consist of meetings of all faculty members of a department, school, college, division, or university system, or may take the form of faculty-elected executive committees in departments and schools and a faculty-elected senate or council for larger divisions or institution as a whole.[1]

Clearly, FSG commands widespread support, not merely among faculty but among university presidents and trustees, public and private. It is not necessary to assume that this widespread support is prima facie evidence of the virtues of FSG. Even in the absence of formal FSG, trustees have to delegate most of their decision-making authority. As long as university administrators have a plausible rationale, and can assert that the recommendations are supported by the faculty, the trustees are likely to concur in the action recommended. The dynamics of becoming and being a trustee are not conducive to raising hard questions about personnel or policy recommendations.

Although PR and FSG can be distinguished, they can and do overlap. "Peer review" is a dominant feature of FSG. Although PR can be limited to particular decisions, a governance structure which frequently incorporated internal PR would be perceived as a system of FSG. Of course, much would depend upon several criteria. These would include; the extent of administrative discretion to deviate from decisions made pursuant to PR, the culture of the institution and the legal status of decisions made through the PR process.

Why should faculties control the educational and personnel policies of institutions of higher education? Presumably the reasons include the following:

1) Professors know more about the issues, hence they should resolve them.

2) Professors are "professionals". Layman don't tell professionals what to do and how to do it.

3) Professionals discipline the members of their profession; e.g., bar and medical associations control entry to and expulsion from the legal and medical professions. Ergo, as a professional group, professors should do likewise.

THE PARADOX OF FACULTY SELF GOVERNMENT

In public institutions faculty self government presents a paradox, if not an outright inconsistency, with representative democratic government. In a representative democratic system, people have the right to change their policy-makers for virtually any reason valid or invalid. Elections for public office at local, state, and federal levels are taken for granted as an essential component of representative democracy. More accurately, it is taken for granted virtually everywhere except in institutions of higher education.

If professors at public institutions of higher education have the right to make and implement broad educational policy, how can their tenure be justified? What happens to the public right to change policy-makers? In other public agencies the public's right to change policy-makers is not legally restricted by tenure or even considerations of competence. The public can, and often does, remove competent policy-makers from office. Their reasons may have nothing to do with either the competence of the officials or the policies they espouse.

In higher education, however, the contradiction, or the inconsistency or the paradox or whatever, is not even discussed, let alone debated seriously. On the contrary, it is largely taken for granted despite the all but complete absence of accountability for policies made collectively. In any event, professors under faculty self government are not accountable for their policy recommendations or decisions. Supposedly they are evaluated on the basis of their teaching and research. Some institutions also evaluate professors on the basis of "service", but "service" never includes assessment of professorial positions on personnel matters or policy recommendations. Instead, it refers to such things as the time devoted to college committees and academic organizations, presentations to civic and community groups and a wide variety of other activities which may or may not relate to their academic field.

A. Professorial Workloads and Full-Time Employment

In practice, "peer review" and faculty self government are essential to maintain certain fictions that undergird higher education. One is that professorial workloads require meaningful full-time employment. From the rhetoric of higher education, one would think that academicians are grievously overworked. Actually, a significant proportion of faculty time is devoted to collective decision-making, often on the most trivial issues. Even when issues are resolved by individual decision, there must frequently be a prior collective decision to delegate the decision to an individual. Despite the fact that they teach only three to nine hours a week, most professors do not conduct any meaningful research. It is, therefore, essential for most to find another justification for their lack of productivity; faculty self government meets this need very nicely, since its demands can be interpreted expansively and implemented with minimal effort and no accountability.

B. Participation as A Social Disease

Participation is a social disease. It is endemic among professors and college educated housewives. These are the two groups in our society with a lot of time on their hands. They are the ones who are always out there urging participation. Other people, participate only when they have to. They don't erect it as an end. I don't want to participate in transportation policy. I just want to get where I'm going with a minimal amount of time and convenience. I don't want to participate in making medical policy, I just want to be healthly and if I need help to get it promptly. But it's only in higher education that we've turned this around and made participation the end in a sense rather than simply the means which we should do our utmost to do without.

C. The Question of Merit

Of all the arguments for faculty self government perhaps none is more suspect than idea that it fosters merit. Typically faculty self government was contrasted with collective bargaining, which is inimical to compensation according to merit. Let me explain why I find this contrast difficult to accept. Theoretically, at least, it would be surprising if the two procedures led to different outcomes. After all, the same constituency makes the personnel recommendations in both systems; there is no reason to suppose that if a faculty is representated by a union, it will be less supportive of merit pay than it would be through a system of faculty self government.

For example, suppose the issue was whether to provide large merit pay increases to a small number of professors, or whether to spread the money around evenly. It is easy to see why unions oppose merit pay. First of all unions are political organizations i.e., the basis for control is one person one vote. Like political organizations, generally unions find it very difficult to support large rewards for a small number of people. In or out of unions, what most professors want is their share, not to be told that their services are less deserving than someone else's.

This not the only reason for union opposition to merit pay, but it is a reason fully applicable to faculty self government. Why should we assume that faculty directions to union leaders are, or would be different than faculty directions to its leaders in the absence of a union? A faculty member who has a position under one system is not likely to have a different position under the other. Arguably, unionization generates some imperatives of its own which are not conducive to merit pay. For example, it is clear that professorial unions, like any other, have more to fear as a union from fair and objective procedures than from unfair and sujective ones. No matter how fair the procedures, several faculty are likely to feel aggrieved by their exclusion from merit awards. Needless to say, the union leaders are not going to say: "Quit squawking. You didn't deserve merit pay." That is not how one acquires or maintains a position of union leadership.

DIFFERENCES IN DECISIONAL PATTERNS

It may well be that this dynamic is not as operative under faculty self government. At least it would not be insofar as faculty self government does not utilize leadership whose livelihood depends upon their role in faculty self government. For the sake of argument I am willing to concede that a full time union representative is under more pressure to avoid meritocratic judgment than a faculty leader under faculty self government. On the other hand union leadership often consists of volunteers and workload credit is often provided leaders in systems of faculty self government. Overall, I believe the differences are not frequent or substantial enough to expect significant differences in the pattern of decisions reached under the two systems.

I do not assert there are no differences in the decisional pattern under the two systems. My point is a narrower one, to wit, that the dynamics of both faculty self government and collective bargaining are anti-merit. In practice there is probably more salary variation under faculty self government than collective bargaining, because there are more structural variations of faculty self government. For example, if salary recommendations under faculty self government are controlled by a tenured faculty, the latter will recommend a larger slice of the pie for themselves than if the salary recommendations were made through union representation. In the latter situation, non-tenured and part-time faculty members, per se, have as much organizational power as tenured faculty; everyone has one vote tenured or non-tenured. Thus under some structures of faculty self government there may be more salary variation than occurs under collective bargaining. This is hardly evidence of emphasis upon merit, although the variations are explained this way. It is far more likely, however, that the variations reflect the interests and preferences of the tenured faculty. These interests and preferences are not necessarily based upon or related to merit.

FACULTY SELF GOVERNMENT AND "PROFESSIONALISM"

Conceptually, faculty self government also rests upon some basic misconceptions regarding professionalism. The professorial point of view is that professors are "professionals" and that professional groups, such as doctors and lawyers, discipline themselves collectively. This rationale overlooks the fact that the professionals, who "police their own ranks", are largely fee-takers not salaried employees. This fact is critical. It is practically impossible for clients to monitor the activities of fee-takers. A patient who visits a doctor for a half hour every few months is hardly in a position to supervise, monitor, or administer the services rendered or received.

The case is otherwise with salaried employees. An institution of higher education which employs hundreds, perhaps even thousands, of full-time faculty, can supervise their activity at a reasonable cost. Supervision and evaluation can be a responsibility of chairmen, deans, and other academic officers. There is no need for professors to "police their own ranks" to protect the public, which, of course, they don't do anyway. On the other hand, unlike fee-paying clients, an institution of higher education can exercise effective managerial controls. Nevertheless, the governance structure of higher education is dominated by a rationale which makes sense only in fee-taking professions.

This rationale also fails to distinguish between decisions which should be made by a professional organization and decisions which should be made by an employer. In controlling entry, state medical and bar associations decide who is eligible to practice the profession. Such decisions must be distinguished from decisions to employ a lawyer or to employ a doctor. Faculty self government confuses these important distinctions. It treats decisions to employ professionals as decisions on who is eligible to practice the profession. In asserting that the faculty should control who is hired, professors ignore the fact that their institution does not control who can practice the profession. The most it can decide, or they can decide is who is to be employed by the institution. A group of professors employed by a university should have no more right to say who could be a professor than a law firm has to say who can be a lawyer. True, under faculty self government professors can prevent X from teaching at their institution, but such authority cannot be justified on the grounds that "professionals" control entry to and expulsion from the profession. In short, faculty self government confuses the role of group salaried employees, employed by only one of several potential employers, with a state professional society composed largely of fee-takers.

The members of the fee-taking profession are not ordinarily involved in an employer-employee relationship with each other. Efforts to reconcile employer-employee relationships with a "peer" relationship are inherently contradictory. The rhetoric of faculty self government dismisses these contradictions on the grounds that higher education is "different". And so it is, in its uncritical acceptance of goverance structures that confuse or ignore every basic issue of accountability and efficiency.

ALTERNATIVES AND PROSPECTS FOR REFORM

What are the prospects for reform? I would say, they are better than nil, but not much better. A brief review of the obstacles to reform will explain this pessimistic conclusion.

First, the ideology of "peer review" and faculty self government is firmly entrenched ideologically as well as institutionally. There is no active movement to challenge or change these procedures. As a matter of fact, most governance discussions that arise from time to time recommend extending, not curtailing, "peer review" and faculty self government. Several special factors militate against reform. Ordinarily, if social change is to come about, it develops a base in higher education. When, however, the evils to be remedied are part and parcel of higher education and serve the interests of the faculty, the professors do not function as critics but as defenders of the status quo.

How easy it is to convert one's interests to principles. There is no other institution in our society that illustrates that better than higher education. The enormous overexpansion of higher education is one example. However, effectively or ineffectively, professors are critics of other institutions and interest groups in our society, they do not perform this role as far as when their own institutional interests are concerned.

Second, "peer review" and faculty self government are most firmly entrenched in the most prestigious institutions. Consequently, the herd instinct in academe, which is as strong there as anywhere else in American society, operates to maintain these procedures.

The third obstacle centers on the question of who will raise the issues? Not the professors and administrators who have benefitted the most from the existing system. The typical university president arrives at the top of the greasy pole after a series of lesser posts in which his relations with the faculty are scrutinized carefully. Faculty committees established to recommend individuals for administrative positions will ordinarily be interested in ensuring faculty prerogatives. A candidate who challenges these prerogatives would be eliminated forthwith from consideration. To expect university presidents to challenge the system in which they have flourished would be naive, to say the least.

This is not to say that university presidents are rarely faced with the need to oppose decisions/recommendations emerging from "peer review" or faculty self government. On the contrary, such situations arise constantly. Effort however, is devoted to negotiating the differences, not to fundamental overhaul of the decision-making and/or governance structures. In these negotiations, the administration is severely handicapped at the outset; frequent administrative opposition to consensual decisions renders the administrator, not the decision and policy making structure, suspect.

Fourth, the media regrettably cannot be expected to focus public opinion on the consequences of "peer review" and faculty self government. Compared to summit meetings, terrorist attacks, presidential primaries, and all the other staples of media attention, the governance structure of higher education is tame stuff indeed. The average reporter has no basis to question the academic mystique. He'd be scared to do it. If prestigious institutions are characterized by "peer review" and faculty self government, the latter must be desirable.

In sum, although, our society would benefit from the demise of "peer review" and faculty self government, there is no constituency for it in or out of higher education, no public understanding of its adverse consequences, and no prospect of extensive media attention to it. In the face of these obstacles, any discussion of reform possibilities can be left to the Pollyannas in our midst.

FOOTNOTE

[1] American Association of University Professors, American Council on Education, and the Association of Governing Boards of Universities and Colleges, 1966 Statement on Government of Colleges and Universities, in Louis Joughin (ed.), Academic Freedom and Tenure, a Handbook of the American Association of University Professors (Madison, Wis.: University of Wisconsin Press, 1967), p. 98.

REEXAMINING THE SYSTEM:
A CRITICAL REVIEW OF THE PROCESS
C. CAMPUS REALITIES: IS COLLECTIVE BARGAINING EQUIPPED TO DEAL WITH THEM?

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INTRODUCTION

During the late 1960s and the decade of the 1970s, the issues facing faculty unions, while difficult, were fairly clear. Increasing the faculty's role in governance, obtaining higher salaries and benefits for faculty, and enhancing faculty job security were high on the lists of most faculty unions and, in most cases, their gains have been impressive. But the issues facing college faculty in the 1980s are more complex and more difficult to resolve, whether by a union, a senate, an academic department, or the faculty as a whole. Just past the mid-decade mark, it is time to stop and analyze some of these issues and to determine to what degree faculty unions and faculty governance in general have been successful in resolving them.

CAMPUS REALITIES: NEW DIRECTIONS AND TRENDS

I. Heightened Expectations for Faculty Performance

The most publicized issue facing college faculty this decade is the pressure for a higher level of faculty performance, both in terms of quality and quantity. Several trends have produced this pressure, and few countertrends seem available to relieve the pressure. Some of the pressure is campus-based, emanating from the desire of institutional leaders (generally administrators) to enhance the prestige of the institution by upgrading the quantity and quality of faculty publications and grant procurement. While such pressure is customary at research universities, it has spread to state colleges, liberal arts colleges, and even to two-year colleges in the form of increased pressure to perform scholarship concerning teaching and curricular issues. On many campuses, the academic reward system is congruent with the value system which rewards publication and grantsmanship, while efforts to improve teaching or to revamp a stale or irrelevant curriculum go largely unrecognized and unrewarded.

The lack of congruence between the faculty reward system and efforts to improve teaching and curriculum are especially troublesome when one considers the spate of national reports which appeared just over a year ago, all of which addressed, to one degree or another, improving the quality of undergraduate education. While only one of these reports placed the blame for inferior undergraduate education on the faculty, all of the reports clearly viewed the faculty as the "answer" to the "problem" of poor quality education, and exhorted the faculty to revise curricula, learn new methods of teaching, and to spend more time with students. None of the repors, however, suggested ways in which faculty might make time for these increased burdens, nor their implications for collective bargaining or faculty workloads, and only one, the NIE Report, suggested that modifications of the academic reward system might be necessary.

A third source of pressure for heightened faculty performance has been the increasing accountability demands from higher education funding and regulatory sources. Although this is primarily a public sector phenomenon, the private sector, increasingly squeezed financially, has not escaped the dictates of accountability demands. Furthermore, most higher education collective bargaining is in the public sector, thanks to the Supreme Court's Yeshiva University decision, and thus this pressure falls disproportionately on institutions with faculty unions. In many states, the state governing or coordinating agency requires reporting of faculty activities and the proportions of time spent on various faculty responsibilities. At some institutions, performance appraisals of both nontenured and tenured faculty are conducted annually, and some institutions have adopted the Management by Objectives approach from industry to track faculty performance. In many states, the evaluation of employees is a management prerogative and not subject to negotiation; however, unions have responded to these accountability requirements by demanding that the procedures used to conduct the evaluations be fair, that the faculty member be permitted to view the evaluation and to write a rebuttal, and that an appeal process be available for faculty who believe their evaluations are unfair or inaccurate. Thus, while unions have been able to influence the processes used, they have less power to participate in setting the substantive goals of the performance appraisal or to determine which types of faculty will be rewarded.

A fourth source of pressure, although not focused explicitly on the faculty, affects their jobs and their interests both as employees and as professionals. Demographic fluctuations and changing patterns of student vocational interest have motivated many colleges and universities to heighten their efforts to recruit students. Departments and programs which cannot attract a sufficient number of students to support the number of faculty employed therein may find their size reduced or their program eliminated completely. A wave of litigation challenging institutional decisions to lay off tenured and untenured faculty in the face of financial pressures has established the almost unilateral power of the administration to decide which programs and faculty will be eliminated, often without consultation with the faculty. While some unions have successfully incorporated provisions in their collective bargaining contracts which protect faculty re-employment rights and promise faculty the opportunity to transfer to other positions for which they are qualified, judicial attitudes toward retrenchment decisions favor the prerogative of management to make the "business judgments" that it deems appropriate for the good of the institution as a whole.

II. Professionalization of Institutional Management

A second trend of the 1980s which has implications for faculty governance is the tendency for the administration of higher education to become more professionalized. While academic administrators appear still to be drawn from the disciplines, individuals responsible for budgets, planning, facilities, and other matters not strictly academic are increasingly coming to academe from the business world. Although long-range planning and resource allocation decisions become more important as enrollments decline and resources fluctuate accordingly, faculty are seldom included in these important decisions. Research on faculty governance in the 1960s and 1970s showed that faculty were excluded from planning and budgeting during those years as well. It appears that faculty unions have not been as successful in penetrating the planning and budgeting process as they have been in influencing faculty personnel processes and enhancing faculty economic interests.

III. Stable Union/Administration Relationships

A third trend on many of today's unionized campuses is the evolution of stable relationships between union leaders and campus administration. This finding is not surprising, for on many campuses, bargaining has been in existence since the late 1960s or early 1970s, and one would expect that the relationship would gradually mature and become somewhat less confrontational. Furthermore, a stable relationship between union leaders and administrators enhances trust among these individuals and probably benefits faculty interests most of the time. However, this stability may operate to exclude other faculty from an effective voice in campus governance, as administrators become accustomed to dealing with certain union leaders and to consult them for advice on the faculty's behalf. The U. S. Supreme Court recently approved the exclusion of faculty who were not representing the union from any formal role in the governance of Minnesota's community colleges, either at the local campus or the state level.[1] To give unions their due, it is difficult to interest most faculty in even a minor role in campus governance, and research conducted on dual-track governance (systems where a faculty senate deals with academic and professional matters and the union controls financial and welfare issues) demonstrated that the same individuals tend to be active in both the non-union and union governance structure, not because they want to dominate governance, but because few other faculty wish to participate.[2] Nevertheless, unions have probably been less successful in enticing a wide range of faculty to participate in campus governance than either the unions or their critics would have expected, and the stability of administration/union relationships exacerbates the isolation of the rest of the faculty from campus decision-making.

IV. Effectiveness of Dual-Track Governance

Early critics of faculty collective bargaining predicted that unionization would destroy the faculty senate and other non-union governance mechanisms. Research conducted in the 1970s and early 1980s[3] determined that few senates had been disbanded as a result of faculty unionization, and that, in fact, non-union governance was healthy at unionized campuses. Reasons for the continued existence of the non-union governance structure included faculty support for a dual governance structure, union concerns that abolition of the structure weaken faculty support for the union, and extensive blurring of the boundaries between the two structures as union activists participated in both systems. In fact, it was probably this last finding—that union leaders also participated actively in the non-union governance system—that contributed to the success of dual-track governance, for structural conflicts between the two systems were avoided as the same individuals participated in both.

Many non-unionized governance structures are incorporated into the faculty collective bargaining contract, either as a mechanism for protecting these structures from dissolution by the administration, or because no faculty governance structure pre-dated the first collective bargaining contract. Research has demonstrated the effectiveness of contractual protection for non-union governance systems, particularly on campuses where the union is cautious not to intrude on "traditional" senate prerogatives such as curriculum or personnel policy.[4] However, the National Labor Relations Board has ruled that a contractually-based governance system which results in extensive faculty participation in institutional governance renders the faculty "managerial employees," despite the fact that no governance system existed at all prior to the negotiation of that contract.[5] While this ruling is of less significance to faculty at public institutions, it suggests the fragility of the faculty governance role, even when protected by contract. Although dual-track governance has been found to contribute to the stability of campus relationships among faculty, union, and administration, it has not been successful at separating the roles of advocate for faculty employment interests from faculty professional interests, nor, apparently, has either the union or the non-union governance structure been successful in addressing the pressures facing the faculty today, and discussed at the beginning of this presentation. Perhaps part of the problem is that much of the important "business" of the college or university occurs within the departments, in an arena which is often relatively untouched by union influence, and which has little relationship to campus-wide governance mechanisms such as senates. However, department faculty often must make decisions within boundaries set by higher hierarchical levels; it is unclear to what degree faculty unions or senates participate in the creation of those decision boundaries.

V. Faculty Renewal

The Bowen and Schuster study demonstrates, among other needs, the critical need for faculty renewal. As the professoriate ages and turnover is minimal or non-existent in many departments, faculty may need assistance in keeping current in their discipline, in reaching out to other related disciplines, and in improving their teaching. The national reports stress the importance of curricular redesign and the critical faculty role in this process, yet most faculty are narrowly trained in their disciplines and lack the breadth of knowledge to develop the interdisciplinary curricula prescribed by these reports. Funds for research, especially research that straddles disciplines or sets off in new directions, is limited in many disciplines. This lack of support for faculty self-improvement, when added to the increased performance demands on faculty for publication, create sizable morale problems.

In all fairness, the national unions have tried to address the recommendations of the national reports and their meaning for faculty. Each of the three national faculty associations—the AAUP, NEA and AFT, focused on the reports at their national meetings last year, and discussed ways in which the recommendations might be implemented. It is not clear, however, what role the local bargaining agents are playing on campus to gain support for faculty renewal and curriculum reform. The issue is difficult because it requires additional resources for retraining, for professional development, for released time to allow faculty first to prepare themselves to tackle curricular redesign and then to accomplish that task. Perhaps these are issues that fall between the "cracks" in dual-track governance. Is faculty renewal a faculty welfare issue or an academic/professional issue? Which system should be its advocate: the union or the senate? If faculty have no role in resource allocation decisions, either through their union or through a non-union governance structure, can they gain support and resourcees for faculty renewal?

IS THE STRUCTURE ADEQUATE?

The issues raised in this presentation suggest that faculty are facing a series of problems that the current governance structure may not be well equipped to address. Part of the problem is the degree to which unions are limited to negotiating over terms and conditions of employment, a concept which is interpreted narrowly in some states. It is unlikely that unions will be able to modify either state or federal laws governing collective bargaining in order to expand the scope of negotiations.

Another problem is faculty apathy. Bowen and Schuster have noted that faculty morale is low on many campuses, and that faculty feel stale and unappreciated. Given the difficulty encountered by faculty governance groups—whether affiliated with a union or not—in engendering faculty participation in governance, it is unfair to castigate faculty unions for creating oligarchies on campuses where the proportion of faculty participating in any form of governance is low, especially in light of the Supreme Court's decision that limiting the role of faculty in unionized governance is perfectly appropriate.

Nevertheless, the resulting leadership vacuum concerning issues addressed in this presentation suggests that the faculty themselves must create a structure that will help them address the increased pressure on faculty, the greater accountability demands, and the need for faculty renewal, not by resisting these pressures, but by grappling with them and finding creative solutions to the problems they pose. There are campuses where the faculty has insisted on curricular revision, has gone about it with enthusiasm, and has developed a system to reward such efforts. There are departments where the faculty have adjusted workload assignments to free certain colleagues to pursue new interests, to retool, or to improve their teaching skills. There are schools where faculty have collaborated to locate and obtain external funding to strike out in new research directions, to develop new curricula, or to create centers for the improvement of teaching.

The problems facing faculty today are weakening the profession as a whole as well as affecting the vitality and morale of faculty as individuals. Faculty unions are already equipped to address these issues because unions tend to favor the good of the group over the good of the individual, as their status as representative of the faculty as a whole requires them to. Now that relationships with administrators over faculty economic welfare issues have stabilized on many campuses, it is time that faculty unions addressed the professional interests of faculty in new and creative ways. Now that faculty collective bargaining is "mature," it must begin to address the problems that accompany maturity—renewal, revitalization, and continued progress toward the quality of life and the quality of higher education.

NOTES

1. Minnesota State Board for Community Colleges v. Knight, 104 S. Ct. 1058 (1984).

2. Lee, B. A. 1982. "Contractually Protected Governance Systems at Unionized Colleges," Review of Higher Education, 5, 69-85.

3. Kemerer, F. R., and Baldridge, J. V. 1975. Unions on Campus. San Francisco: Jossey-Bass. See also Begin, J. P. 1974. "Faculty Governance and Collective Bargaining: An Early Appraisal," Journal of Higher Education, 45, 582-93.

4. Lee, "Contractually Protected Governance Systems." See also Mortimer, K. P. and Richardson, R. C. 1977. Governance in Institutions with Faculty Unions: Six Case Studies. University Park, PA: Center for the Study of Higher Education.

5. College of Osteopathic Medicine and Surgery and Faculty Federation, Local 3473, AFT, 256 N.L.R.B. 37 (1982).

REEXAMINING THE SYSTEM: A CRITICAL REVIEW OF THE PROCESS
D. THE FACULTY OPPORTUNITIES AUDIT

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INTRODUCTION

In preparation for these remarks, I re-read Howard Bowen's and Jack Schuser's study of he American professoriate and reflected on its dramatic subtitle: A National Resource Imperiled. Today, we have heard Schuster's spirited defense of that subtitle. My own emphasis will be on those people and institutions who are doing something about deteriorating working conditions, low faculty morale, and other signs of peril on our campuses.

Among the people I know personally and with whom I have worked in the past several years are the members of the Task Force on Professional Growth of the American Association for Higher Education. The Faculty Opportunities Audit which Russ Edgerton and I assembled in the Spring of 1985 was the result of their reflections and of their experiences at a variety of different colleges and universities.

We conceived the Audit as a means of collecting data from and about faculty but, more importantly, as a means of encouraging individuals, small groups, or entire departments to think about issues of faculty professional growth and to evaluate their relationships with their institutions within a larger context.

THE ROLE OF THE AUDIT

The Audit has been used thus far by a number of institutions, from the University of Washington to Creighton University in Nebraska to St. Francis College in Pennsylvania to the University of Rhode Island. The findings have been trickling in, though some faculty leaders and administrators have preferred to keep them confidential, primarily in order to overcome suspicions and skepticism among faculty participants.

There are several ways in which the Audit has proved useful, and I will mention them briefly here:

1. **as a consciousness-raising instrument for faculty leaders and administrators;** the Audit, to paraphrase a well-known TV commercial, asks: "It is 1986 at the

College of ..... Do you know where your faculty are?". Even the most savvy and perceptive administrators do lose touch with the rank and file of their teaching faculty. Especially if the faculty is large and the administrator overworked, there is a real danger of growing isolation and, soon thereafter, of distrust. The Audit provides an opportunity to compare and contrast various views of the same institution. Any significant discrepancy between the perceptions of the teaching faculty and those of administrators, especially academic affairs people, is highlighted by the Audit and should lead to the opening up of a serious dialogue on campus;

2. **as an inventory of existing and potential opportunities for faculty professional growth**; the Audit encourages faculty to explore opportunities for growth within traditional roles. It reassures those who, like the author of a recent Point of View page in The Chronicle of Higher Education say timidly (having heard the prophets of doom): "Excuse me, but I like being a college professor." But the Audit also legitimizes the need—for some people at some institutions—to push out the limits of traditional roles and to seek new challenges, for instance, through teaching in unconventional settings, consulting, and community service. Finally, the Audit legitimizes the need for some faculty to move out of academic life altogether in order to pursue second or third careers in other sectors.

3. **as an instrument for assessing the quality of faculty life** in those areas that are most directly influenced by administrative policies and actions (workload, salary, leave, sabbatical). For the purpose of this conference, it seems appropriate to dwell on the third use of the Audit. In order for the Audit to be used, however, administrators at the department or school level would need the support of union representatives. Ideally, at collective bargaining institutions the Audit should be augmented by questions designed to elicit faculty opinions on the union contract and the union representative(s), as part of a larger assessment of how faculty feel about their institution. If an instrument of this type were incorporated in the collective bargaining process, it could yield much useful information to both sides at the bargaining table. But there would be problems, of course.

The Audit data available thus far were collected at small and medium-sized non-unionized institutions. In each case, the initiative of using the Audit was taken by academic administrators in consultation (more or less) with faculty. We may assume that at least some faculty viewed the Audit primarily as a management tool and had to be reassured that it would not be used in a punitive fashion.

SUMMARY

As I reflect on the experiences of some users, I am beginning to think that something like the AAHE Audit might, in fact, be more valuable at unionized institutions than anywhere else. Because it can be used to assess opportunities for faculty professional growth and the quality of faculty life generally, it would have to be used within a collective bargaining context, that is, by academic managers—whether at the department, school, or university level—with the explicit consent and cooperation of the faculty union. If this were done, unionized institutions might use the Audit as part of a systematic, orderly, and well publicized assessment process, implemented according to written procedures. The implementation of the Audit and the use of findings would be removed from the personal idiosyncracies and (some might say) from the hidden agendas of individual administrators. Moreover, at large institutions with thousands of faculty, the Audit might yield more useful data for evaluation and planning purposes than have become available at smaller institutions.

III. HOW "OTHER PROFESSIONS" BARGAIN

A. LABOR RELATIONS IN BASEBALL
B. THE PHYSICIANS
C. ACTORS' UNIONS
D. PROFESSIONAL EMPLOYEES

HOW "OTHER PROFESSIONS" BARGAIN
A. LABOR RELATIONS IN BASEBALL

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INTRODUCTION

What's happened in professional sports in the last ten years is something I think is very strange from a societal point of view. We have debates being played out in baseball, which at some level is a game, but in its real sense is merely the entertainment world. We appear to say that there were profound lessons there for everyone to learn and other industries should copy. The very idea that the drug testing debate should have its most public on-going focus in the context of professional athletes, of all people, is a very strange one. One might think that you would get the airline pilots first or you would do doctors first. Or, you would get to some people that have an effect on someone elses life a little more directly, but we don't do that.

The reason we don't is also sort of obvious. Professional sports, in general, baseball in particular, has an inordinant hold on the American population. Think about what a baseball fan does everyday. He listens to the game or he watches it. If he can't do that, he watches the replays or he watches the news. Then he gets up the following morning to read about it. He reads it in the newspaper, everyday. This goes on, used to be, from about the beginning of March through the end of September. Now it goes on, with the on-going soap operas all winter. So what you have is a tremendous focus on this particular industry that colors everything that you do because it means, in certain respects, that you're operating in a fish bowl. You have to be very concerned about what you say and to whom. You're not only speaking to your own membership, which are the people that you want to speak to, and that you need to speak to, but you're also speaking to everybody else. Everybody, seemingly, especially on the other side, is playing to the public all the time.

The development of collective bargaining in baseball came very slowly. As a matter of fact until, really 1970, and a little bit in 1968, there was no meaningful collective bargaining in baseball at all. The result of that was that major league baseball players were, on an economic basis, one of the most, if not the most, exploited group of workers, and certainly professional workers, in the country. Let me try and describe for you the circumstances that confronted major league baseball players when Marvin Miller arrived on the scene. He took over in 1966, in July. Nine years later when I got involved in baseball during the first free agent case, the Mescherschmidt-McNally case, most of the world that Marvin had found was still there. When I read the papers and looked at the pleadings, I found myself calling Marvin up in New York. I was in Kansas City at the time, saying I read this and it seems to mean this can't really be true, not in the United States in 1975. He very patiently assured me it was. What we found was this: Rule number one about baseball, and this does not effect the other sports, only baseball, is that it is exempt from the antitrust laws. That has a profound and overriding impact upon the employees, the players. The employees are really two things; they are certainly the employees, and predominately that's what they are, but they are also, sort of, the product. They are also, sort of, a commodity. Whenever someone's in a position to engage with all of the other people in a particular industry, in fixing prices and finding markets, and setting up, at the very least, an oligopoly, and they are free from antitrust restriction, then all kinds of things happen to people that otherwise wouldn't happen.

ISSUES IMPACTING ON LABOR RELATIONS IN BASEBALL

A. The Draft System

For example, we have something in baseball called the draft. Just apply it to yourselves. What would it be like if when you were in undergraduate school and somebody decided that what he would like to be was a history professor, but there are no such classifications as history professors. There is just a classification of professor. There are also various grades down, sort of like the minor leagues. All of the universities that there are, and there can only be a limited number of them, in baseball its twenty-six teams, get together and they hold a draft. You get drafted by Joe Jones University which happens to be located somewhere you don't want to work. What they want you to do is teach computer science. Now you might not know anything about that, but you're the best professor available in the draft and that's the talent they're looking for. You then have a very simple choice. You go into some other occupation, or you sign a contract with this organization to go to work, let's say in Idaho. You don't want to live there. You grew up in Florida. That's where you want to work and that's where your family is. Those are the only choices that confront you.

That is exactly what happens in all professional sports, but in baseball it's worse than in the other sports because we don't even get around to drafting 22 year-olds. We draft them out of high school. We say that if you want to play professional baseball, then out of high school you must go to this organization. "Now, I know that you're seventeen and you grew up in Southern California, but you're going to play in a class A team in Maine." It doesn't matter if you don't want to work for that organization because you're stuck there until one of three things happens. You can become a free agent, which is an interesting term I'll come to in a moment or you get traded. You can be traded around from one employer to another, at their whim, anywhere in the country, except it's worse than that because actually it's international. It used to be theorically possible for an individual to be traded from an American team to a Triple A team in Mexico and never again be permitted to play baseball in the United States unless the Mexican team traded him back, and they were under no obligation to do that. The third possibility is that you become unconditionally released.

I've just thrown out a couple of terms which sort of describe the situation that you get into. A baseball player, when he's not good enough to play for his team anymore, becomes unconditionally released. That is to say, the club graciously releases the player of his contractual obligations to it. The rest of us get fired. In baseball you get unconditionally released.

B. "Free Agency"

We have had a lot of litigation in baseball over a concept known as free agency. What in the world is that? I mean try and define it outside of a sports context. An unfree agent? A free non-agent? It doesn't make any sense. An agent ordinarily refers to somebody who represents or acts in a capacity on behalf of some other third party, corporation or person or whatever. In sports, it has a specific meaning. Free agency in professional sports, only comes about in one of two ways, at the player's volition. In basketball, hockey and football the unions have backed and won antitrust cases, which limit the right of the clubs to collude and fix prices for players. In the case of baseball, a free agency provision is negotiated. And therein lies the real difficulty and the somewhat uniqueness of professional sports.

You get drafted by a major league organization, and you go into that organization. What the job of the union is, is to find a way, at an appropriate time in your career, or appropriate times, to create a circumstance in which economically you can get paid something resembling what you're worth. This must be done in addition to negotiating the other terms and conditions of employment. Well, how do you do that in a system in which you have no seniority provisions? As a matter of fact, being around too long is likely to decrease your value rather than increase it. In this system, you're being publically graded on your performance in the newspapers everyday. There are also five hundred people trying for your job every minute, each one of them younger and each one of them willing to work for less. Each one of them is promising management more and more and more. How do you do that?

What you have to do is create a free market for players services. What happens under the reserve system is that Club A gets together with Club B and says:

> I reserve these forty players to me plus all the players in the minor league organization. I will reach the following agreement with you. Club owner B. I will not under any circumstances attempt to sign one of your players to work for me, whether his contract is over or not, whether he wants to work for you or not, or whether he quits or not. In return, all I want from you is that you agree to keep hands off my players.

So you sit there talking to your players, and you say, "Okay people, you want to play baseball, here are the terms. You don't want to play baseball, that's okay, go do something else. See if you can get a job somewhere else". "I don't want play baseball with Steinbrenner. I want to play baseball for O'Malley in Los Angeles." Too bad because O'Malley has an agreement with Steinbrenner that says he won't talk to you, come what may. If you quit, you get put on a disciplinary list. You are restricted. If you say well then I'll retire. Well then you go to a voluntary retired list. But, if you decide to unretire, you can still only play for the one club that you played for before.

This kind of a legal conspiracy, if you will, is all encompassing. There are agreements reflecting this understanding between essentially every major league team, every minor league team, and every team in Latin America and the Far East. There is no place you can go in order to escape it. What the union does is to negotiate a provision which says, at some point "enough is enough". Joe Jones has played baseball long enough. He has the right, when his contract is over, to leave and other clubs have the right to sign him if they want to. Furthermore, whatever they want to offer, if he wants to accept it, you may no longer have agreements among yourselves restricting the marketability of this individual player.

When the free market system works, you get a very clear demonstration of the magnitude of the restraint the prior conspiracy had. For example, prior to 1976, the average salary in major league baseball was a little less than $40,000. The contracts were all for one year. They were non-guaranteed, meaning that if the player was released he didn't get paid. The median salary was something just under $20,000. By last year, in ten years of a relatively free market, the average salary had risen to something just under $400,000. Now what does that mean? What that means is that people in the past had been vastly exploited and vastly underpaid. This has happened at a time, don't believe what you read about major league clubs losing money, when the average value of a franchise went from the ten or eleven million dollars that Steinbrenner paid for the Yankees thirteen years ago to something in excess of a hundred million dollars now. Part of this stems from a national T.V. package that paid the owners a little under 25 million dollars from 1976 to 1979 and now pays approximately seven times that on an average. The amount of money that flows through the industry is simply staggering.

The clubs have now gone back on the offensive. They have said, "We understand we have a collective bargaining agreement that says we won't conspire. We don't care anyway. We will conspire." And so you have the remarkable circumstance of a player like Kirk Gibson who, to the Detroit Tigers, is worth over a million dollars a year over three years. To no other major league club was he worth the minimum salary. He could not get another offer from any other major league club. What are they trying to do? They're trying to fix the system. What our task is now is to find a mechanism, legally if we can, through bargaining if that fails, to preserve a free market for players' services. If we can't preserve a free market for players' services, then, what I call the sort of great experiment that professional sports have had, will end. The great experiment is that the union doesn't negotiate salaries. What the union negotiates is a minimum salary, and the conditions of free agency, or salary arbitration, or trade demands, and so on, under which individual negotiations take place. If that doesn't work anymore, then that has to end. Then you go back because the law probably requires you to, to far more traditional bargaining. Although you wouldn't bargain wage rates, I think, in this particular circumstance, you would have to bargain percentages of industry income to be divided to the players.

One final word on this subject. You get into other funny words which describe the system that we have. We were out fifty days in 1981, on an issue called free agent compensation. Well, you know, what's compensation? It obviously doesn't mean what you get paid in this context. It has a connotation that you had something. You didn't want to lose it. You lost it and so you should receive something in return to make you feel better, to compensate you for your loss. I lost my free agent and I deserve to be compensated. That's nice. It sounds right. Everyone wants to be compensated when they lose something. I don't think there's much doubt about that. But the economics of it are much, much different.

I become a free agent and I go out on to the open market. Let's say I'm worth ten dollars to the New York Mets and that's who I want to play for. The Mets job is to sign me as cheaply as they can, assuming they want me. But they're not going to go more than ten dollars. That's my value to the Mets, ten dollars. My job is to get as much as I can but I can't get more than ten dollars, because that's the value.

What compensation is though is a concept which says that as the price of signing me, what the Mets have to do is pay my old team, let's say it's the

Yankees, a sum of money or something else of value, a draft choice. Let's say the value of that compensation is three. Well, I'm not now worth thirteen to the Mets, I'm still only worth ten. So that means that my maximum bargaining power with the Mets has been cut from between zero to ten to between zero to seven. My bargaining power has been cut thirty percent. If the compensation is high enough, you won't get any offers at all or, if it's imponderable so the Mets don't know what the cost would be, you won't get any offers at all. But the loss to the player is directly proportionate to the amount of compensation. Why do the owners like that? Well, it's because the owners keep all the money that way. The owners pay each other when players change teams. And the players never get the value of their services. The value of the service gets paid to the person that allegedly owned the asset. This brings you to the most incongruous part of it all—the asset that you are owning is a person.

C. The Salary Arbitration Procedure

There's one other device which has provided a very useful mechanism for setting salaries; the salary arbitration procedure. This only works if you have a free market to establish what an appropriate salary is. If you don't have a free market, then all the salary arbitration procedure does is to fix salaries within the range of whatever the repressed market is that you otherwise have.

Salary arbitration came about in 1973 as an attempt by the owners to respond to the Players Association that they were exploiting everybody. Some clubs like Boston paid very well, while some clubs like Minnesota wouldn't pay anything no matter what. This was an attempt to equalize salaries between the various clubs. There was no free market. When free agency came in, we had a free market. Salary arbitration now is the substitute for free agency. A player, once he gets the minimum years of service in the major leagues, will be able to arbitrate his salary in any year which he cannot be a free agent. If he can be a free agent, he does not have the right to arbitrate.

The arbitration system itself is deceptively simple. It had better stay that way or it'll become unworkable. In some respects, it is an arbitrator's dream. The parties have a maximum of three hours to present their cases. There are established criteria in the agreement. By contract, there cannot be a record. Evidence is taken, basically anything anybody wants to throw in there, subject to some limitations with the arbitrator deciding later on what weight he wants to give to it. The arbitrator must choose one figure or the other. He can't split the baby, which forces the numbers together. The arbitrator must render his decision within twenty-four hours, he has no choice about that. What's most interesting about it, is that the arbitrator is prohibited from writing an opinion or publicly giving his reasons for the decision, even if he wants to.

The key to salary arbitration is really very simple. Can you come up with a set of criteria which makes sense in an industry in which it is difficult to classify people collectively? How do you compare Joe to Fred? It's very difficult in terms of their value to the team or what they produce. If you can come up with a criteria and then force the parties to be responsible in their salary offers, you force the parties together. The result is that in virtually every year of salary arbitration, negotiated settlements range from seventy to eighty five percent of the cases. We have very few cases tried. Of those that go to arbitration, the clubs win about sixty percent. They don't win sixty percent of the big ones, but they win sixty percent of the cases. The reason is that most of the good players' cases settle every year. They aren't tried. The question remains, can you come up with a set of criteria that can define people, providing everybody believes in it and is willing to take the risks and do it right? That remains the critical question.

D. The "Drug Testing" Issue

The "drug testing" issue in baseball is entirely invented. I don't think it's a real issue at all. It is an issue designed to arouse the public, to polarize players against one another, and to make the players look bad to the public. The reason why is very simple. The "drug testing" issue gets used against the players in individual salary negotiations. You have less value than you used to because there's all these drug things running around. "I know it doesn't affect you, but everybody knows that if a few players are on drugs it's likely that everybody is. And you won't take a test." Now mind you, nobody that's any good is ever deprived of an opportunity to play because of drugs. So, you come up with interesting devices to allow them to continue to play.

But now we come to the real issue. Is it surprising that drugs surfaced in baseball and in other professional sports? Manifestly it isn't. It would have been absolutely astounding if they hadn't, given what's going on in the country the last several years. I'm sure that a lot of you that are in actual teaching probably have the experience that I've recently had. The roots of this kind of a problem get lost for the people that are now involved in it. I go around to spring training trying to describe to people that are eighteen and nineteen and twenty years old what was going on around here in 1967 and 1968. They all sort of look at me. I might as well be talking about 1867 and 1868. It was sort of always there, when they got there. It was acceptable.

People have drug problems. There are a number of ways to deal with problems. You can deal with it as a medical issue or you deal with it as a disciplinary problem. You can have a combination between the two. You can also treat it as a public relations problem or some combination of the three. These are the various approaches that one can take.

Under our collective bargaining agreement, we have a fairly standard Just-Cause provision. That is to say, if there is any individual that is disciplined, it has to be for just cause, both for any penalty imposed and for the severity of the penalty imposed. We have no problem with that. Any player that's disciplined for drug use has the right to file a grievance and have that issue adjudicated. Theoretically, at least, he wins or he loses, depending upon the evidence.

Clubs in baseball didn't want to do that. They wanted to play public relations with it. After a series of incidents, things straightened out a little bit. We negotiated a joint agreement which nobody knows about and which the owners have subsequently terminated. We thought that it had some rather forward-looking provisions in it.

If you were a user, you had protections under the agreement. If you were using at work, distributing, or were convicted of a crime, you had no protection whatever. Whatever the evidence demonstrated, you could be disciplined and all you could do was file a grievance or challenge it on unjust cause grounds. The penalties could include the potential of a lifetime suspension.

If you were just a user, you had certain protections. When the matter first arose, if you missed work you had up to thirty days leave at full pay. Everybody wants to know where thirty days comes from. That's a concept which is now well engrained in drug treatment. Insurance companies pay for the first thirty days of somebody's treatment. The second time in your career you missed work because of a drug related matter your salary got cut in half. After sixty days in a treatment program, your salary reverted to the major league minimum or you could be released.

We had this agreement in place and had three doctors, neutrals jointly appointed, that were administering it. They were talking to people. If there was a dispute between a player and club, they would resolve it. They controlled the testing. Yes, we had testing, but we didn't have random testing. What we had was testing any time that there was a reason to believe that it was an appropriate thing to do. Testing was ordered either by agreement of the player and the club, which the player could rescind, or if three doctors heard the matter and ordered it.

During the eighteen months that agreement was in effect, we thought it worked. It also shut off publicity. The only publicity we had then came from outside sources; the matter in Pittsburgh blew it away. The owners then terminated our joint-drug agreement, which they had the technical right to do, subject to some motive questions, which are outstanding. They then began to press players for mandatory testing, pressing the union to agree to it collectively and pressing individual players to agree to it individually.

We approached this question on a number of different bases. The first one under our agreement was this is not a subject appropriate for individual negotiation. You want an agreement, negotiate with the union. They didn't want to do that because they knew it wasn't likely they would get one that they could live with. What they want to do is force players to do it individually. If your going to have testing, they already know that we will agree with testing for cause, where there's a reason and a neutral third party determines it's appropriate. They don't want to do that either because, you see, that forces a club to come up to somebody and say I think maybe there's a problem. If everybody's tested all the time then we won't have to do that.

There are practical problems with testing. What do you test for? Do you test for alcohol, for amphetamines and/or prescription drugs? Each thing you add increases the cost and the likelihood of error. How often do you test? Do you want to do it once a year for public relations purposes, which isn't likely to catch very many people, if any? Or, do you want to do it often enough to really catch the cocaine users, three or four times a month.

What inferences do you draw? There are certain tests, I now understand, which suggest that blacks are likely to come up positive. Other tests for marijuana react to skin pigments in the same way that a substance in the marijuana reacts to it in chemical tests. Those are all the practical problems. They haven't got much to do, in our judgment, with the gut issue.

As we see it, it really comes down to this. What the clubs say is that some baseball players have had drug problems. Therefore, we want to test everybody, all the time. What does that mean? Well it means a number of things. Is someone in the employment context, and admittedly the constitutional guarantees do not apply in a legal sense, going to be presumed innocent until proven guilty, or is he not? What is the effect of refusal to take a test? Is that an inference of guilt? Yeah, it is. That's what they want it to be. Well, what does that do to who has the obligation to prove the charges against somebody? That obligation all of a sudden is turned. It's not managements' obligation to prove somebody did something wrong.

Is it the employees' obligation to demonstrate on demand that he's not guilty of something that no one suspects him of being guilty of? It subjects the individual to search and seizure not only without probable cause, but without any cause at all except that you have a job. It requires an individual, in effect we think, to testify against himself. The last thing it does, is it may test for the presence of substances which may have no work-related impact at all. The question is, does drug testing become an ongoing condition of employment?

What people forget is that if it's okay for baseball players today, I don't know why it's wrong for you all tomorrow, or for anybody else. Then it becomes an issue which could transform this country from one end to the other. If you say we will now let corporations do all of those things we forbid the government from doing, then where are you? The government rides on the backs of the corporations; it can subpoena everything.

You see, the real question here it seems to us, doesn't have anything to do with drugs. The philosophy underlying mandatory drug testing applies to everything else. It applies to whether or not you're a thief. It certainly applies to lie detectors once you get past the technological problems if they're accurate. Do you want to have a system at the work place in which people are presumed innocent until proven guilty? It's up to somebody to prove that you're guilty, not up to you to prove your innocence. You get an opportunity to confront your accusers. You're not searched without cause. Or, do we want to turn all that around and throw it away? Do you want to say that because you have a job and there is a drug problem in the United States and in baseball, you, in this context at least, will now waive all of those rights. From where I sit, that's the issue that has to be talked about, and yes that's not the issue anyone wants to talk about. That's the hard issue.

HOW "OTHER PROFESSIONS" BARGAIN
B. THE PHYSICIANS

Barry Liebowitz, President
Doctors Council
Clinical Asst. Prof., Downstate, SUNY

INTRODUCTION

Doctors Council is the largest union of attending doctors in the country. Begun in 1959, our union currently represents over 3,000 physicians, dentists, optometrists, podiatrists and veterinarians who work in twelve public and private hospitals, five neighborhood family care centers, seven city agencies, 35 health care stations, two private dental clinics, and one private Health Maintenance Organization. We represent doctors working in a wide variety of settings from the largest emergency room in the world to the city's prisons and the coroner's office.

"DOCTORS COUNCIL"

Doctors Council serves as a traditional labor union. We represent our members in collective bargaining negotiations with their employers for contracts that establish wages, benefits, job security, and other working conditions. We act as an advocate in grievance and arbitration hearings that provide our members with due process. We are involved on an on-going basis in working with unorganized doctors who wish to unionize. Since our inception, we have experienced a continual increase in our numbers that has been more rapid in the past several years.

While we function much the same as any other union, as a representative of doctors, we have a distinct professional obligation to promote and protect the quality of care provided to our patients. We bring our concern for patient care to all that we do. Our mandate as a doctors' union is to strive toward the overlapping goals of improving the services provided to our patients and improving the conditions under which we, as doctors, provide that care.

COLLECTIVE BARGAINING RELATIONSHIPS

Doctors Council is the certified bargaining representative for four separate bargaining units with four distinct collective bargaining agreements. The largest of these units, and our oldest bargaining relationship, includes those doctors employed by the New York City Health and Hospitals Corporation and the

Department of Health. Although we had previously negotiated contracts on behalf of groups within that unit, we first signed a contract for the consolidated unit in 1975. Since that time, we have pursued a series of goals in collective bargaining intended to benefit our members and, at the same time, improve the delivery of health care. Our first task was to raise the base pay in order to attract the quality and quantity of doctors needed to staff our municipal health care facilities.

Prior to the emergence of the so-called glut of doctors in New York City, the lack of attending physicians attracted to work at our public hospitals was a major problem. Later, we sought to secure a more stable workforce by negotiating contractual provisions that reclassify sessional employees to per annum status, thereby providing them with tenure rights. In our most recent contract, we have furthered our goal of encouraging experienced doctors to remain in the public health care system by negotiating a system of longevity differentials. We have sought to rationalize the system of employment by removing archaic titles and revising the pay structure so as to reduce irrational salary inequities between comparable titles. In all, we have worked to create a rational employment structure that encourages a workforce motivated to remain in the public health care system.

In our quest for more equitable working conditions and promotion of quality care, Doctors Council has formed strong links with community groups that share our interest in health care. These include the Public Interest Health Consortium, Brooklyn Health Action Committee, and New York Committee on Occupational Safety and Health. We work together to monitor the scope and quality of services provided in our health care institutions. We successfully fought to keep 102 dental clinics open in 1980. Together with Harlem community groups, Doctors Council prevented the closing of 10 child health clinics. We were active in the fight against the closingof Sydenham Hospital. Our lobbying efforts were instrumental in obtaining increased funding for Health Department dental services in 1982. In 1985, we played a major role in the City Council's decision to allocate 1.7 million dollars to fund expanded dental services in our public schools.

Along with our organizational efforts to safeguard the quality of care, we encourage our members, as individuals, to report if their facilities are not adequately equipped and staffed, or are improperly managed. Lack of supplies, inoperative equipment, lengthy delays in obtaining test results, are all issues of working conditions that threaten the well-being of our patients. Using traditional grievance channels, government processes, and public pressure, we seek to ensure that adequate resources are allocated to our health care system.

UNION COOPERATION AND RELATIONSHIPS

Doctors Council also works closely with other municipal unions on issues of mutual concern. We sit on the Municipal Labor Committee and I am a Vice Chairperson of the Municipal Labor Committee's Steering Committee. We work closely with such unions as District Council 37 of AFSCME, the Teamsters, and the New York State Nurses Association on issues that affect all health care workers. We have joined together to protest when toxic substances were discovered at worksites, threatening the health and safety of staff and patients. We have worked with other unions in lobbying against the city's efforts to contract out health care services to the private sector. Most recently, we spoke before the Board of Estimate against the city's expansion of subcontracting practices in Prison Health Services. We have always opposed subcontracting, in part, because of the lack of accountability of private contractors. Recent events in this city, which link contracting with corruption, have proven our point. Doctors Council recently spearheaded a campaign by city unions to reevaluate the security of our public hospitals. While over the years we had lodged many complaints with management about the lack of adequate security in our city's hospitals, it was the murder of one of our members at Kings County Hospital that brought the unions together to mount a major campaign.

Doctors Council is also part of an informal network of doctors' unions throughout the country. Two years ago doctors' unions existed in only four states. Now they can be found in 14 states. With other unions of doctors, we share information and resources particular to salaried doctors. We have assisted in the formation of fledgling unions of fellow practitioners, including Doctors Council of D. C. General Hospital in Washington, D. C..

ISSUES CONFRONTING "DOCTORS COUNCIL"

A. Private Sector Organizing

While our membership has historically been in the public sector, we find ourselves increasingly approached by salaried physicians in the private sector who wish to organize. We have just concluded a first union contract for doctors employed at Woodhull Hospital, a public hospital at which the medical services are contracted out to a private corporation which employs the doctors. We also recently finished negotiating a contract for physicians employed by a private Health Maintenance Organization. This is the third private sector HMO which we represent. We believe that the number of doctors who work as salaried employees of small Health Maintenance Organizations will increase in the future and we believe that this trend will also bring an increase in unionized doctors.

B. Third Party Payors

Our concern about malpractice rates and the increasing control of third party payors and government over how physicians practice medicine are ones that affect all doctors—whether part of the growing number of physicians who are salaried or those in more traditional private practices. We have joined in discussion with organizations of doctors that are not unions in an attempt to devise new strategies for these emerging problems.

All of us in the labor movement are acutely aware of the profound changes taking place in our industrial environment. Employer demands for concessions and runaway shops present a challenge to the survival of many unions. Those of us who represent workers in the health care industry are also at a critical point. The imposition of new systems of reimbursement by government and medical insurers, and a general emphasis on judging medical services solely in terms of profitability, are profoundly changing the shape of health care in this country. These changes threaten the quality of services that are provided, especially to the most vulnerable among our population—the poor and the elderly. The race for cost containment in health care facilities will bring cutbacks in important, but unprofitable, services. We are already beginning to see dumping of undesirable patients, primarily those who are uninsured or expensive to treat, into our public hospitals. Hospital employeees daily confront the havoc wrought by an increasingly hostile federal government and increasingly profit-motivated health care industry. We have seen the immediate effects that the new systems of reimbursement and increased pressures for cost containment have on our patients. Our vigilance as a union and the vigilance of our members as practitioners has never been more necessary.

C. Changes in Health Care

These changes in health care are having a profound effect on how doctors practice medicine. Skyrocketing costs of private practice—in terms of rents, malpractice rates, and the other expenses of doing business—and a surplus of practitioners in some areas are causing an unprecedented number of doctors to seek salaried positions. In our hospitals, attending physicians are feeling increased pressures to limit medical treatment and the length of hospital stays to remain within the bounds of reimbursement. The emphasis on cost containment means that control over directing patient care is increasingly being given over to hospital management and third party payors.

Doctors are facing greater financial pressures and less economic security, coupled with decreasing control over directing medical treatment and a more limited role in determining the quality of care. The result of these changes is less autonomy for doctors and less control over their work. While in the past doctors may have had trouble seeing themselves as labor, many can no longer ignore that we are increasingly treated as labor. The need for union protection is blurring the distinctions between employees who wear a blue collar or a white collar, or those who wear green surgical scrubs or a white lab coat. The corporatization of American medicine is forcing doctors to see the need for collective action.

SUMMARY AND CONCLUSIONS

The tremendous increase in the number of doctors joining unions reflects a growing awareness that only through unionization can we confront the economic realities of our times. Traditional professional organizations, including the American Medical Society and state and local medical societies, are not capable of representing the economic concerns of doctors nor of insuring our power to act as guardians of quality care. Professional associations of doctors have not developed the resources to deal with the issues facing salaried physicians and have proven themselves impotent in dealing with economic issues. Unions have the experience and resources to ensure the economic survival of doctors. As collective bargaining agents, unions have successfully provided doctors with the power to improve the conditions under which they practice medicine and to protect patients from the impact of cost-conscious policies. These are precisely the issues on which professional organizations have failed to represent doctors, leaving us in a vulnerable position as the monoliths of business and government seek to balance their budgets on our backs.

Our fate as health care professionals is inseparable from the fate of our patients. We cannot allow profitability to threaten the quality of care. As Doctors Council seeks to develop an effective response to the challenges confronting us in health care, we look to other unions, older and more experienced, for we still have much to learn. But we also believe that we are at the forefront of a new labor movement—one that is redefining its strategies and is seeking innovative ways of addressing a rapidly changing work environment. We believe that the way to begin is to reopen a dialogue among all unions so that we can share our resources and our strengths.

HOW "OTHER PROFESSIONS" BARGAIN
C. ACTORS' UNIONS

Dick Moore
Editor of Equity News and
AFTRA Magazine

INTRODUCTION

After years of pounding the pavement looking for a job during the great depression, my father finally landed full time work with a California bank. He retired at age 68. They thought he was 65 because he lied about his age twenty-five years earlier to get the job. He said, "They don't want old men at the bank," he used to tell me. And he refused to grow a mustache, which my mother used to admire, because it grew out gray.

Now when Dad retired he earned about $120 a week. And now at age 95, he receives a monthly pension of $28 from the bank. My father didn't have a union, didn't want a union. He believed all his life that he was an executive, that banks were something special and that his sense of professionalism and autonomy set him apart from other workers. Dad succumbed to the notion that because he didn't wear overalls or get grease on his hands, and because he sometimes got to sit at a desk, that unions weren't for him.

The people in the performing arts were not so susceptible to these kinds of blandishments...starting with the musicians, who formed their union in 1896. That was odd in a way, because musicians, actors, singers, and dancers are as autonomous, as independent, creative, individualistic, and competitive as any workers in this world. And certainly, they are as concerned as anyone, and always have been, about their status, about not being part of a faceless mass, about the ability to hold onto themselves and setting their criteria for professional standards and qualifications. So why and how, given all those personal and professional qualities, did they form unions?

HISTORICAL DEVELOPMENT

The oldest of the three big actors' unions, Actors' Equity, was formed by 112 actors on May 26, 1913 in New York City. At that time, motion pictures were considered by the old-timers to be an unartistic and temporary phenomenon, not worth organizing. Television, of course, didn't exist. The legitimate theater, naturally, was the first to organize. The conditions that led to Equity's establishment were similiar to those which the actors in films and television suffered later on and which then eventually led to the formation of the Screen Actors Guild and the American Federation of Television and Radio Artists.

Since the late 1800's, exploitation of the actor had become a permanent condition of employment. There wasn't any standard contract. There was no minimum wage, no fixed conditions, and no predictable number of rehearsals. An actual and typical contract between a very well-known actress of the day and her producer, specified that. . ."for $20 a week the actress played in any theater the producer chose, that she furnished all, gloves, shoes, tights, stockings, lace, and feathers," ...any other modern costume which she happened to own. She'd rehearse for 13 weeks without salary, and work seven days a week, giving as many performances as the manager required. She'd receive no salary if the company couldn't obtain suitable bookings or if the star got sick and couldn't perform. In those days, it was also common practice to fire actors on the opening night, (perhaps after four months of rehearsal with no pay) to abscond with the box office receipts and leave the company stranded far away from home without transportation or a return ticket to New York. In short, the producer set his own requirements and few actors were able to stand against them.

There had been sporadic attempts to organize a union, but they were unsuccessful. Finally on May 13, 1913, 112 dedicated actors drafted the constitution of the Actors' Equity Association. It wasn't that easy, of course, it never is. Powerful theater owners and producers, some of them very well known actors themselves, bitterly fought the fledgling union. George M. Cohan committed $100,000 of his personal fortune to the destruction of Equity. For six years, the union tried to negotiate a contract that managers would recognize. The producers simply would not negotiate and refused to acknowledge Equity as the collective bargaining representative.

Equity finally appealed to the American Federation of Labor for affiliation but it couldn't be accepted because there was already a charter out to an organization called the White Rats, an organization essentially of vaudeville performers, which was a forerunner of Equity. There was a lot of negotiating among the union heirarchy which resulted in the White Rats relinquishing its charter. An organization called the Associated Actors and Artistes of America was formed. The Four A's in turn recognized Equity as the union representing actors in theatre and the White Rats as the union representing vaudeville performers.

Thus, armed with AFL-CIO affiliation, the union gained additional power and finally, on August 7, 1919, it struck for recognition. The strike lasted 30 days, it spread to eight cities, it closed 37 plays and prevented the opening of 16 others. It cost everybody, in round figures, about $3 million. Supported by the stage-hands and musicians, Equity found that its membership grew from 2700 to 14,000 and its treasury, which had been about $13,000 when the strike began, had increased to $120,000 despite the expenditure of over $5000 a day. When it was over, the managers had signed a contract for five years which included practically all of Equity's demands. The prototype for organizing the performing arts had been established.

Similar abuses suffered by film actors led to the formation of the Screen Actors Guild in 1933. The film studios forced all actors under contract to take a 50 percent wage cut and all freelance performers to accept a 20 percent cut. They just said this is what's going to happen and you're going to take it. The actors grumbled, but without a union, they had to take the cut. Forcing that pay cut was probably the biggest mistake that the studios ever made. The Screen Actors Guild was formed. Despite the prestige gained by numerous important stars who joined the organization, the Guild, like Equity, had a long uphill battle for recognition. By 1937, a strike seemed to be the actors only hope. But would the stars go along? They were the people who could make the difference, and had the least to gain.

In a referendum of its star performers, the Guild got its answer. Ninety-eight percent of them said yes, they would support a strike. At a membership meeting of the union on May 6, 1937, Robert Montgomery, then president of the Guild produced a signed statement by Louis B. Mayer and Joseph Schenck, moguls of the industry. Faced with an imminent strike, they had agreed to recognize the union, the actors and the unions primary demand. The film actors then had their union.

AFTRA, the American Federation of Television and Radio Artists, was the last of the big talent unions to organize. Its forerunner was AFRA, (American Federation of Radio Artists), chartered by the Fours A's in 1937 and exercised jurisdiction over radio. Not until after World War II was television considered important enough to even think of organizing; and it wasn't until 1950 that through the formation of a trusteeship by the component organizations of the Four A's that an organization called Television Authority was formed. Finally, it merged with AFRA and it became the American Federation of Television and Radio Artists which now exists in that form.

UNION ADMINISTRATION AND OPERATING PROCEDURES

While there are minor differences in the administration and the government of these unions, they are basically the same. Each has an elected board of directors composed of working members. In this respect, the performing artists unions are different from other labor organizations in that the presidents, the officers, and all the members of the board are unpaid volunteers. The governing boards meet regularly to determine issues of policy which are enforced and administered by a staff of paid executives.

Of the major performing artists unions, only AFTRA and the musicians unions have locals. The others are governed from central branches, either in New York or Los Angeles. Major activities of these unions have been contract negotiations, enforcement of wages and working conditions. They all negotiate working conditions, minimum wages and fees. One thing that makes their contracts unique is that the stars in every medium, virtually all of them, negotiate far more than the basic minimum salary that the union sets. Hours, paid holidays, vacations, severance pay, pension, health insurance, residual payments for reuse of one's work, and grievance machinery, are the main concerns.

Health and safety have been major issues. They have included:

a) James Cagney ducking real bullets in some of his early gangster films

b) dancers concerned with having to work on concrete floors

c) weather broadcasters concerned with having to fly in helicopters, and

d) people in newsrooms concerned about the possible effect of VCRs on their eyesight and their health.

Despite the preoccupation with the bread and butter issues, both Actors Equity and AFTRA have made several economic and social breakthroughs of far-reaching significance. Equity has been in the forefront of the civil rights movement. In 1947, when the National Theatre in Washington, then the showcase of American theatre, barred blacks from admission, Equity decreed that its members could not play in that theatre. As a result, this theatre was closed for five years. When it reopened under different management with a policy of nondiscrimination, Equity returned. It is now written into Equity's contracts that its member cannot be required to perform in any plays where discrimination is practiced.

Equity was also the first union in America to include compulsory arbitration in its contracts.

It was AFTRA that established the first pension and health plan for performers in 1954. Because performers have multiple employers, the most important feature of their pension plan is portability; the ability to accumulate pension credits from one employer, and take them and apply them to one's bank of credit based on earnings and years of service rather than continuity of a single job.

A LOOK AHEAD

The greatest problem faced by the performers in our country remains pretty much the same as it was when the unions were formed—unemployment. There are always more people looking for work than there are people working. In recent years the problem has grown worse as technology has eroded job opportunities and used the performers' own work to deny him a chance to earn a living. First the LP phonograph threw tens of thousands of musicians out of work who had been employed at radio stations. Then television gobbled up all the old movies and everything else they could find in an endless quest to fill what appeared to be unlimited air time for which sponsors were eager to stand in line to buy commercials. Then came tape recorders, cable, satellite television and VCRs. The appetite for the artists' work was endless and the opportunities to steal it were unlimited.

Compounding this problem is the fact that the United States is virtually the only major country in the free world that is not a signatory to the Rome Copyright Convention. This means that American performers almost alone do not have performers' rights under international copyright law. There is absolutely no international protection for them, and very little more under domestic law against the piracy of our filmed, taped or recorded work. We must go to the bargaining table to try to get from our employers, protections that most other countries have mandated by law.

The issues facing performers today are complex and difficult; we need all the help we can get and do not get it from our government. Ralph Bellamy, former president of Actors Equity, was asked on a platform such as this why he, a star, felt that he had to be in a union and give so much time to it. The questioner could understand why a poor struggling actor would want a union, but why would Ralph and others like Beatrice Arthur, Carroll O'Connor, Ethel Barrymore, Leslie Uggums, Dinah Shore, Mike Wallace, or Loretta Lynn, care? Why would they be involved? Ralph answered for them all when he said, "There wouldn't be a profession if it weren't for the unions. Before the unions, actors were equated with thieves and prostitutes. It was only through their unions that they gained some status and had to be dealt with as a profession by employers and the public. It was only because of their unions that they couldn't be ignored."

Today, as much as ever, the profession is a nightmare of pitfalls and insecurities. The unions have not been able to do anything about that. I doubt that they ever will. But whatever protection or stability America's performers have achieved, it has been largely through their unions.

HOW "OTHER PROFESSIONS" BARGAIN
D. PROFESSIONAL EMPLOYEES

Jack Golodner
Director, Department of Professional
Employees, AFL-CIO

The labor movement, as far as professionals are concerned, arrived a long time ago. It's just the myth-makers, the academics, the press, our government leaders, and all those people who're suppose to shape public opinion, who have not recognized that. The conventional wisdom still is, you can't organize professionals, professionals don't belong in unions, they can't engage in collective bargaining.

"PROFESSIONALS" WHO BARGAIN

I think we have to deal with certain myths and certain fantasies in day-to-day work. There is this constant romance, so to speak, with the professions, that they are somehow unearthly; they don't belong in the real world. The real professional is placed above the battle. Realistic things like collective bargaining, wages, compensation and job security shouldn't compete in the language of the professional. And yet, what have we seen? Today the professionals in this country, and they number some 16 million, are better organized than the work force as a whole. Some 29 percent of those professionals engage in collective bargaining. If you substract what we would say are people who have not really made an attempt to organize—the administrators, the judges, some of the self-employed—then the impact that unionism has made in the professions approximates about 40 percent of the organizable professionals. Far greater than the degree of unionization among the work force as a whole.

In higher education, it tracks about the same. About 36 to 40 percent of professionals among public universities and colleges are participating in collective bargaining today. Only about ten percent participate in the private sector but when you average it all out, in higher education it's about 26 percent organized. Not bad. Yet we get the old myth-makers saying, "Well, you know, you can't organize higher education." These figures are, despite the fact that you have the Yeshiva decision, which militates against organizing in the private sector, are encouraging. There are various other social inhibitions against unionizing. "I didn't raise my son or daughter and didn't send them to college, and all that so they can be union members."

Journalists (electronic and print), performing artists, doctors, nurses, librarians, social workers, engineers, every major profession in this country is represented through the 28 national and international organizations that are affiliated with our department in the AFL-CIO.

THE STRUCTURE OF BARGAINING

These organizations take many shapes and forms. The Newspaper Guild started out as a writers' union and journalists' organization and began to incorporate other occupations as a way of gaining strength and solidarity. Other organizations, like Actor's Equity, Screen Actors' Guild and the American Federation of Teachers pretty much maintain their base and their growth within their own occupational group. Makes no difference, everybody finds their own way. In our department, we provide the link between all of the professions. We are the largest interdisciplinary group of professionals in the country today.

Interdisciplinary is the key word. No organization of such size and scope, in terms of affiliations and membership, brings together so many different professions. Yet, we find that there's much in common. Professionals profess to know more than those who employ them and so professionals are retained, or were historically, and not employed. The professional group historically consisted of the ministry, teaching, medicine and law. But they were retained. Even a university professor was retained by his students not by a university. A university, to the professor, was like a courtroom to a lawyer. It provided a forum, a place to meet, a place to do your business. But they didn't employ them. The professional professed to know more, they insisted on autonomy, peer control over quality of service, and entry into the profession as a way of maintaining quality and, above all, their service was to the public. They had a "higher calling". It transcended the client.

In those days, old methods of organization were suitable. Organizations participated in, what later became known as, "collective begging". But times changed. The size and scope of the institutions employing the professional grew immensely. As the size and scope grew, the positions of the professional, vis-a-vis the decision-making levels, became more distant. The identification with the end product or service, more remote. The professional, although they professed to know more, was no longer being heard. Thus, there was a need for a new type of organization.

THE "PROBLEM" OF ADVANCES IN TECHNOLOGY

Another factor affecting all of us is technology. Technology has been moving ahead at a very rapid pace. At one time it was possible to look ahead and pretty much predict what was going to happen in the next 10 or 15 years in terms of technological developments. Within a generation, it was easy to advise a young person what to train for, what kind of education to seek. It's no longer possible. The average engineer graduates college today and within five years much of what he's learned is obsolete. In ten years, he'd better start looking for another job if he hasn't kept up with the "state of the art". Technology affects the professions as much as any other occupation. There's that overall sense of insecurity, the need to refresh oneself, the need to keep up with the "state of the art". To keep up with the "state of the art" so that the quality that the professional must deliver is there. The employing institutions being remote and having other agendas often cannot meet those needs. Again, the need for a newer type of organization.

Society is becoming more centralized in terms of the decision making that goes on. Matters that effect you at a particular campus are being determined in Albany and elsewhere. In Albany, you'll find decisions are being fashioned to what is being done in Washington. In Washington, we learn that there are needs and priorities other than education. They are determined and dictated on an international level. Laws are made to govern a locality but they are overturned by a court in a different area remote from that locality. They are sometimes superseded by other laws, state and national, and even those can be changed by international treaties.

Various of our affiliates will come with a problem that effects the profession and can be addressed by Congress, by some administrative agency or by some international body. What does advancing technology mean to the people in the performing arts, high fidelity sound recordings and now compact disks? What does it mean to the artists? It means that our copyright laws are woefully out of date. What does that mean to us as professionals? Intellectual property rights are being undermined. We talk about the need to encourage creativity in this brave new world and this information age. Yet, we've done nothing, or very little, to protect the intellectual from the undermining of his or her creativity, his or her rights in their product and in the products of their mind. Congress and other legislators both here and abroad have been unable to understand and keep up with the rapid changes that are occurring.

THE ROLE OF THE UNION

What do we do as an organization of unions? We are addressing copyright laws and patent laws. We are trying to bring them into tune with the times. We are establishing in the minds of our legislators, and in the international forums, a respect for intellectual property. We lobby for more education funds. We lobbied for the creation of the National Endowments for the Arts and the National Endowments for the Humanities. Many members of Congress, who were there in those days in the 1960's when those two agencies were created, would say that if it wasn't for the AFL-CIO, (and if it wasn't for the unions of professionals within the AFL-CIO) this government would have no commitment to the cultural life of our country. Those unions were able to do that in those days because they had the affiliation. They spoke, in a sense, for 13 to 14 million people. They weren't self pleaders saying give us money so we can raise professors' salaries, or give us money so that the actors will work more, painters will sell more. No, they were talking in behalf of a large number of American consumers who said we want a better quality of life. These professional people can deliver it to us if you give them the opportunity.

We are the youngest body within the AFL-CIO, having been chartered in 1977, in recognition of the fact that some three to four miillion professional people participate in unions.

Through our department, through the AFL-CIO, the professional comes down off Mount Olympus and talks to the public without the interference of the employer or the client. The professional is addressing society, the public. That's they way it was in the old days and that's the they way it should be. The professional is saying, this is where you're being short-changed. This is a future I can bring to you if you allow me to. I can provide you with better health care. I can provide you with more information and news and entertainment and culture and art. I can provide you with more books and learning. I can build you better homes, and safer cars. But I need your help and understanding, because this myth about the professional being all powerful is just a myth. I am now subject to the whims of employing institutions or of purchases of my services whose power is far greater than mine, alone.

What kind of issues are these new professionals bringing to us? In addition to the legislative and public affairs problems that I alluded to, many of them are the same that unions have addressed for centuries—compensation, fairness, job security or tenure. They have different words. We talk about tenure; we talk about retention rights. We don't talk about seniority any more; we talk on the job standards and standards in the delivery of services.

We have interns who've written into their contracts minimum staffing. We have nurses who are negotiating for professional responsibility clauses which mirror the "nurse practices act" of most states.

Symphony musicians in many areas now have committees which audition the future members of the orchestra. They also have a say in whether a member is going to receive tenure in that orchestra.

A LOOK AHEAD

There are some interesting new wrinkles developing. We are moving into very exciting areas. You may have heard of the committee of the AFL-CIO on the future of work which the press has lauded as a fine example of a major institution in American life washing its dirty linen in public. This committee has been in existence about two years and its just beginning to spill out various reports. Many of them very exciting. I sit as a member of that committee. And to me one of the exciting things is an acknowledgement that the labor movement in America transcends collective bargaining. We've been doing it for years. We've engaged in social and community issues of various sorts. For the first time, this activity has been legitimized. What we're saying now to everyone is that whether we achieve a majority in a NLRB election or, whether you are employed or self-employed, you belong with us. The last part is very exciting to me because we are talking to people who are self-employed professionals. Why are they talking to us? Because like employees, like the employed professional, they feel powerless not vis-a-vis an employer but vis-a-vis the purchasers of their services.

Independent freelance writers, for example, face a mammoth industry in selling their product. Graphic artists and illustrators face the same. They have their organizations but because of the laws and because of the National Labor Relations Act they have never been able to qualify as "an employee organization" protected by the law, and viewed by the law as capable of entering into collective bargaining. We say nonsense now to that. We're not going to be limited by the law in that respect. We will define who is going to be a part of tomorrow's movement, not the law. We will be offering services to those who find it difficult to obtain. These include our research services, our lobbying services and our ability to negotiate on a group level for many benefits.

There's nothing immutable about a union organization. They can adapt to any occupation. They can serve any profession. There's nothing fixed about the way a union organizes, the way it structures itself, and what its policies are going to be. Neither is collective bargaining. It's a means to an end. But what should the end be? There's a dialog going on now within our house. Should the collective bargaining contract be a vehicle to bring about a resurgence, a renaissance, of the old professional ideals of professional autonomy, peer review and a power over the decision making that translates into quality of service? Many of our unions are addressing these issues through their collective bargaining process. Trying to recapture some of the power, some of the autonomy of the independent professional is a major goal.

Others will say that it's a lost cause; we are now employees, or we are now pawns in a great power struggle that's gone beyond that. We should limit ourselves to bread and butter issues. History never changes. That debate went on in the early days of the AFL. Is it bread and butter or something other? I think we're reaching an accommodation with both in our organizations. We feel a responsibility to the public. And because we do, we feel a responsibility to the professional practitioner and a need to shield them from the whimsical shackles of nonprofessional controls. We'll see where it ends up. In a very ironic way, in a very paradoxical way, the Yeshiva decision is probably forcing us away from professional type unions. Yeshiva says the more we succeed in gaining some control over our professional life, the less protection to bargain under the law.

We have much to do in this country. It's exciting. I hope all of you will enter into the dialog with us. We're building new types of professional organizations. I believe it's the way to address, not only the problems of our professionals, but the problems of society as a whole.

IV. BARGAINING IN PRIVATE COLLEGES IN THE AFTERMATH OF *YESHIVA*

A. YESHIVA UNIVERSITY
B. BOSTON UNIVERSITY
C. POLYTECHNIC INSTITUTE OF NEW YORK
D. COOPER UNION

BARGAINING IN PRIVATE COLLEGES IN THE AFTERMATH OF *YESHIVA*
A. YESHIVA UNIVERSITY

Ralph E. Behrends, Professor
Yeshiva University, former Chair
Faculty Steering Committee

BACKGROUND

In June 1970, Yeshiva University consisted of six undergraduate and four graduate schools located on three campuses in Manhattan, as well as the Albert Einstein College of Medicine in the Bronx. The medical school played no role in the unionization issue. Of the six undergraduate schools, two were liberal arts colleges and four were Jewish studies schools. The salaries of the approximately 200 full-time faculty members of the ten schools at issue fell, at that time, into three broad categories: competitive with other universities at the graduate schools and with respect to comparable small four-year colleges, less competitive at the liberal arts colleges and extremely below competitiveness at the undergraduate Jewish studies schools. Woven into each category were an unusual number of salary inequities. Amongst the undergraduate faculties, dissatisfaction with salaries was intense.

In addition, the three categories were differentiable in other ways. For example, at the graduate schools, the faculties formally met and made judgments concerning the professional qualifications of prospective candidates for appointment, reappointment, promotion and tenure which the deans and higher administration took into consideration when making their decisions. As a whole, the graduate faculties felt that this procedure led to a fair, equitable and professional treatment of candidates.

At the undergraduate schools, the qualifications of candidates were primarily determined by the deans and directors who sought, more than others, advice from selected individual faculty members. As a whole, the undergraduate faculties felt that this procedure led, far too often, to factors other than professional qualifications being determinative and hence, that many candidates were not treated fairly, equitably or professionally. This was especially true in the undergraduate Jewish studies schools where the overwhelming majority of the faculty were kept indefinitely at the rank of instructor and hence, ineligible for tenure. Since each of the faculties met separately with their dean or director presiding, the resulting, often bitter, dissatisfaction with this and other procedures of the dean or director was expressed publicly in these meetings only by faculty who had been notified of termination, while the continuing faculty felt compelled, for obvious reasons, to mute its dissatisfaction and to acquiesce in its direction by its administrator. The continuing faculty only expressed its dissatisfaction privately amongst trusted colleagues.

Since there was little or no contact between members of different faculties, no faculty member knew whether the situation in one school was unique or common to all the other schools. Moreover, each of the faculties believed that its own best interests were served by going it alone rather than by seeking comon cause, a belief encouraged by the deans and directors.

THE DRIVE TOWARDS UNIONIZATION

By 1972, however, it had become apparent to some of the graduate faculties that the administration had drastically changed its policy toward the graduate schools. For example, support for graduate students was cut, principal investigators cited acts of harassment and the administration, having frozen graduate faculty salaries for two years and undergraduate faculty salaries for only one year, refused to promise equitable treatment for graduate faculty in 1973 and began saying that it would not be unhappy to see graduate faculty leave.

At that point, two of the graduate school faculties, science and social science, began considering the possibility of unionization. For the next year, some graduate faculty members personally met with some individual members of the Board of Trustees, pleading for their intervention. This effort proving of no avail, the two graduate faculties filed with the NLRB for certification as a union in the Spring of 1974.

In the ensuing NLRB heaing, the university contended that the graduate faculties were part of the entire faculty and not separate graduate school faculties servicing the undergraduate schools. It became clear, after the university began combining undergraduate and graduate departments into university-wide departments and issuing letters of promotion and tenure not in the graduate schools but in the university, that the university's position would prevail. As a result, the two graduate faculties withdrew their position before the NLRB.

Ten days later, on October 30, 1974, the Yeshiva University Faculty Association (YUFA) filed a petition for certification as the bargaining agent for the entire faculty of all the ten schools. All of the suppressed dissatisfaction had led most of the undergraduate faculty to welcome the idea of unionization. While graduate faculty openly joined YUFA, fear led undergraduate faculty to join secretly with only two elected representatives surfacing. Moreover, their fear of outside domination led YUFA to be an independent union. Most of the opposition to YUFA was based on the belief that it was inappropriate to take the disputes within this university to outside agencies.

NLRB PROCEEDINGS

In the ensuing NLRB hearings, the university appeared to be trying to create, by introducing much irrelevant material, as voluminous a record as possible in order to confuse the case. However, the unit sought by YUFA was found by the NLRB to be appropriate with the single exception of principal investigators who were excluded as supervisory. On the question of the faculty as a whole being managerial and supervisory and not just professional employees, the administrators all tried, in their testimony, to portray themselves as powerless and to interpret the lack of recorded evidence of disapproval by the faculty of administration actions as evidence that the administration was simply carrying out policies advocated by the faculty. The same fear that had led the undergraduate faculties to fatalistically acquiesce in the administration's direction and to join YUFA secretly also caused all but the leaders to decline to give testimony that contradicted this interpretation by the administrators. However, it appeared that the NLRB had sufficient testimony from faculty leaders in contradiction to this interpretation that, given its experience, it became convinced that the university's contention was not true. The hearings ended May 6, 1975 and a new phase began with the administration being unconstrained by a developing NLRB record.

In December 1975, just before the NLRB election was to be held, a charge of an unfair labor practice was filed against YUFA by a faculty member opposed to the union claiming that the union was tainted because one of he organizers at the time of the original filing had been a principal investigator. While this charge was being considered by the NLRB, the administration increased the faculty's teaching load from 12 to 15 hours for the fall semester of 1976. The unfair labor practice charge was rejected by the NLRB and in December 1976 the election was held. At its conclusion, one of the NLRB officials, on his way back to headquarters, was mugged and his NLRB ballot box was stolen. Another election was held for the part of the unit involved and, as a result of a 91 to 50 vote for YUFA, YUFA was certified on December 29, 1976.

REFUSAL TO BARGAIN

The university refused to bargain and a charge of an unfair labor practice was filed against it by YUFA. In June 1977, the university abolished the Graduate School of Science. The NLRB upheld the unfair labor practice charge and sought enforcement of its order to bargain in the Court of Appeals for the Second Circuit on October 17, 1977. This court denied the petition on July 31, 1978. One month later, on September 1, 1978, the university fired five tenured faculty members. For denying academic due process in the summary dismissals of these tenured faculty members, the administration was censured by the faculty of Natural Sciences and Mathematics on September 5, 1978, by the faculty of Arts and Sciences on October 6, 1978, by the Senate of the Albert Einstein College of Medicine on July 11, 1979 and by the American Association of University Professors in June 1982.

The decision of the United States Court of Appeals for the Second Circuit stated that the faculty was managerial and "substantially and pervasively operating the enterprise" and that "the 'ultimate authority' of the trustees...has been delegated to the faculty and the administration." Although the faculty knew that it was an illusion that the faculty operated the enterprise, it decided to accept the Appeals Court finding as true that the faculty had such authority and try to use it to rectify the situation.

Essential to the illusion that the faculty wielded so much power was the way the administration had obtained approval from the faculty. To overcome the problem of faculty representatives who feel compelled to acquiesce in administration direction in the presence of administrators, the faculty decided that its approval on important matters could only be given by the faculty as a whole and not individually by faculty representatives. To overcome the problem of faculty at meetings presided over by deans or directors feeling compelled to acquiesce in administration direction, the faculty decided also to hold meetings in the absence of administrators and to determine faculty approval or disapproval on important matters only by secret mail ballots from the whole faculty and not just those able to attend a meeting. On November 7, 1978, the faculty approved, by a vote of 72 to 3, a "Statement on Organization" of the faculty of Arts and Sciences that provided for a Faculty Steering Committee to advise the faculty and provision that faculty approval be by secret mail balloting of the whole faculty.

THE AFTERMATH

On February 20, 1980, the U. S. Supreme Court upheld the decision of the U. S. Court of Appeals stating in the decision, with regard to the faculty, that "Their authority in academic matters is absolute." On December 29-30, 1980, the faculty held a teach-in and moratorium with the students on faculty salaries and the disrespect exhibited by the administration toward the faculty. By January 20, 1981, the academic vice president had precipitously resigned and had been replaced by a new executive vice president. On March 13, 1981, the faculty approved a "Statement of Faculty Approval" by a vote of 96 to 3 with 9 not voting that vested the authority of the faculty in the faculty as a whole and stipulated that faculty representatives were advisory to the faculty and not authorized to grant faculty approval.

After escalating conflicts with the administration over governance, the faculty approved a detailed "Statement on Faculty Self-Governance" on February 11, 1983 by a vote of 100 to 6 with 1 member not voting.

On May 14, 1984, a follow-up team of the Middle States Association scathingly condemned the faculty's procedures. Although recognizing that the faculty was not asserting final or supreme authority but was only seeking to give its advice to the administration, Middle States rejected the use of secret mail ballots, meetings of the faculty in the absence of administrators and the restrictions that some faculty representatives are only advisory and cannot grant faculty approval. Middle States' recommendations were for essentially the same procedures that created the illusion that misled the courts into believing that the faculty was operating the enterprise when, in fact, it had no say whatsoever. It appears that the faculty is faced with a catch-22 situation.

BARGAINING IN PRIVATE COLLEGES IN THE AFTERMATH OF *YESHIVA*

B. BOSTON UNIVERSITY

Michael Rosen[1]
Associate General Counsel
Boston University

I will say at the outset that the views that I express are my own. I am not speaking as an official representative of Boston University.

BACKGROUND

Historically, the faculty union at Boston University initially sought representation in 1974. In 1975 a unit, consisting of full-time faculty members at one of the two campuses, was determined as being appropriate. This excluded the medical campus, the dental school and the law school. It did, however, include chairmen. An election was directed in which there were aproximately 872 eligible voters. In fact, if I have the numbers correctly from the "Yeshivawatch", the Boston University unit is the largest Yeshivaed university. In May 1975, 394 members of the faculty voted in favor of a union, 262 against with 40 challenged ballots. Based on the 394 votes in favor, the union was certified. The University's request for review was denied by the Board. In order to obtain judicial review of the determination, the University refused to bargain. An unfair labor charge was issued and unheld by the Board. It was enforced by the First Circuit in April of 1978.

Following the First Circuit's enforcement of the bargaining order, the University filed a petition for a Writ of Certiorari to the Supreme Court of the United States in July 1978. While the petition for certiorari was pending, the University did negotiate with the union. In April 1979, following two strikes by the faculty, the first collective bargaining agreement was entered into between the trustees of Boston University and the Boston University Chapter of the AAUP covering the unit which had been determined by the Board.

As we know, in February 1980, Yeshiva was decided. Two weeks later, March 3, 1980, the Supreme Court summarily granted the University's petition for certiorari vacated the First Circuit's enforcement order, and remanded the case to the First Circuit for further proceedings consistent with Yeshiva. This, you will note, was during the first fully operational year of the first collective bargaining agreement. The contract had provided that it would be subject to the disposition of the university's judicial challenge. This was explicitly noted; the university insistence that this language be in the collective bargaining agreement led to the failure to agree and arguably caused one of the two faculty strikes.

COLLECTIVE BARGAINING

The first agreement covered the years 1979 through to the fall of 1981. While it was running, the case had been remanded to the First Circuit, which in turn remanded it to the Board. The Board ordered a reopening of hearings before an administrative law judge in order to ensure that the record explored the the issues in Yeshiva, particularly since the initial record had been made in 1975 and we were now in 1980. Hearings on the reopened case began in December of 1980. When the hearings concluded, briefs were filed and submitted to the administrative law judge. The administrative law judge did not decide until the end of June 1984.

The first collective bargaining agreement expired in 1981. The second bargaining agreement was then negotiated between the university and the union. I think it would be fair to say that by this point, namely the Fall of 1981, the support for the union at the university was significantly lessened. Illustrative of this point is the fact that the collective bargaining agreement, that was subsequently negotiated in the fall of 1981, was ratified by the rank and file over the objections of the union leadership. The leadership's recommendation was voted down by a number approximately equal to the number of contested ballots in the first election of the union. By the fall of 1981, approximately 60 to 70 people would determine the state of a contested collective bargaining agreement. One could argue that this was a good sign that the impetus for the perceived needs and/or the benefits or protections of collective bargaining were not as strongly felt, or strongly held as they had been back in the middle 1970s, when 394 members had voted in favor of the union.

In June of 1984, the administrative law judge found that the faculty at Boston University were managerial and supervisory. The collective bargaining agreement was due to expire in the fall of 1984. The university informed the faculty that it would not negotiate a successor agreement when the existing agreement expired. The second agreement expired in the fall of 1984 without much notice or fanfare.

YESHIVA AFTERMATH

That brings us to some questions about the aftermath of Yeshiva. Obviously, my views of why the impetus for unionization at Boston University had decreased by 1981 and certainly by 1984 would differ from the views of a faculty member who strongly believes that a union is necessary to ensure or to guarantee things. Certainly, I don't think there would be any dispute that at the time the first collective bargaining agreement was negotiated, faculty salaries at Boston University, as was true at many universities around the country, had lagged behind. Certainly, the need for increases in salary was felt at a time that inflation was beginning to take off. Indeed, the first collective bargaining agreement did contain substantial salary increases; approximately seven percent the first year, ten and a half percent the second year, and twelve percent the third year. By the second collective bargaining agreement, the inflationary trends, as well as the "catch up" needs, had largely passed. The second collective bargaining agreement came in at significantly lower figures, namely, nine and a half percent, nine percent, and eight and a half percent for the three respective years of the agreement.

One of the aftermath questions obviously, is what a faculty gains through unionization and whether those gains are consistent with being faculty members? I'm not prepared to debate the wisdom of the Yeshiva decision so much as to raise some significant questions. Faculty claim there are times when they make recommendations which are not followed, and somehow this proves that they are not managerial. I wonder if the managerial model that they are saying does not fit my school fits any industry in this country. I wonder if there's any manager at General Motors or Ford, or RCA, or anywhere else, who can say that all of his recommendations are always followed. To be sure, if you look at the record of most of the mature universities, and that, of course, is probably a reference to Yeshiva even if it may not reflect Yeshiva University, the record is that the recommendations are generally followed. This presumably is the test. The test that I hear advocated, namely, that there are times when a particular recommendation was not followed, would seem to divest most industry of its total managerial structure with the exception of the CEO of a company and the board of directors.

In addition to money, the collective bargaining agreements at Boston University contained very little of substance that changed university procedures. For example, tenure, promotion, appointment, reappointment procedures (other than the fact that there was a grievance and a binding arbitration provision) remained the same.

One question of unionization verses non-unionized faculty is who benefits. Arguably, under the salary increases in collective bargaining agreements you can look for a spreading out of salary rather than a concentration. You can look for a decrease of merit salary and more across-the-board longevity, cost of living, and similar achievement-blind forms of handing out increases in salary.

ARBITRATION UNDER THE COLLECTIVE AGREEMENT

Under the collective bargaining agreement, there were several arbitrations that were brought to decision. In the first collective bargaining agreement, there were five arbitrations. One involved the interpretation of the salary provision. That award held that the formula used by the university had been inappropriate. Another determined that certain probationary faculty who had not been reappointed had to be reappointed because the faculty had not been adequately consulted. As a result the number of faculty whom the department had recommended not be retained were required to be reappointed. Whether this is a conflict in terms of faculty interest and union interest, is, of course, a very interesting question. The third case involved a claim that the tenure procedures had not been followed. Three people were affected by that; none of them ultimately received tenure. There was one dispute on tenure challenging the denial of tenure. The faculty member lost that. There was one dispute invloving non-reappointment of a probationary faculty member. The faculty member lost that.

The results, under the second collective bargaining agreement, were largely the same. There were three individual cases arbitrated; one on tenure, one on non-reappointment, and one on mandatory retirement. All of these were decided against the union. There were also twenty-nine individual faculty salary cases which were sent to a permanent arbitrator under the provisions of the agreement. Of these cases, six faculty members accounted for sixteen of the twenty-nine cases. In terms of empirical evidence indicating a lack or a lessening of faculty support for collective bargaining, I think the fact that the arbitration mechanisms designed to protect the faculty against some alleged arbitrariness or unfairness, ended up being used by such a handful of people. Not surprisingly in arbitration, out of twenty-nine cases decided, fifteen were decided in favor of the university and fourteen in favor of the union. I'm sure if one more case had been brought it would have been the union's turn to have won. Incidentally, the average arbitration award was $464. I believe the cost in arbitrators' fees just about wiped out any financial gains although the cost was to the union and the university, and the gains were to individual faculty members.

A LOOK AHEAD

It is not clear that collective bargaining at Boston University actually benefited the faculty to any significant extent. It may have benefited a few. It may have benefited some people who would not have achieved distinctions in their own right. And I say that not in any sense as an attack on any individual, I assure you, but only in the sense that the individuals who were able to achieve recognition and recommendations from their peers, generally did not have matters that went to grievance. There are exceptions to be sure. Those cases that we're talking about, I think, represent a small percentage of a unit of 860 odd faculty. The fear felt by the faculty at Yeshiva, I think, regardless of what some people may have perceived in the early 1970s, by the expiration of collective bargaining, wasn't there.

I think one can see, in terms of the aftermath of Yeshiva, that at least at Boston University, there are a lot of important bread and butter benefits the union was not negotiating because they were clearly academic. For example, the faculty was consulted extensively on how new facilities should be designed and how space should allocated between the different departments. Obviously, that would not have been a union concern under the traditional terms and bargaining, although, obviously there are some instititions which might have bargained those kinds of terms and conditions.

I think that when you have this division between a faculty union and a governance body, this split between the terms and conditions of the union's business and anything else which is a general governance body's responsibility, the general governance body ends up having little or no responsibility. At Boston University, what with the exclusion of the law faculty, the medical faculty, public health school faculty and dental school faculty, the union represented a minority of the faculty of the University. Yet nothing could be done in terms of many of the major benefits, fringes benefits and other things without negotiating with the union, and as long as the union was certified.

The aftermath of Yeshiva, at Boston University, in my somewhat biased view, has been that the faculty governance structure is growing stronger. The faculty are more involved in the governance than they were or, I would agrue, could have been under the split necessitated by the collective bargaining agreement model. Now to be sure, I run into faculty on some of the committees I'm involved in who have the argument that, really what they say doesn't matter if their recommendations might not be followed. As someone who is not ashamed to admit that I am a manager, I have no illusion that all of my recommendations to my superiors will be followed. I believe that, on the whole, they will be followed a substantial portion of the time. Or, as one speaker pointed out, in terms of accountability, I had better watch out for my job.

The aftermath at Boston University, has been an increase in faculty accountability, increase in faculty involvement and a strengthening of faculty governance. We are in the process of rewriting the faculty manual which we didn't do for fifteen years. With the advent of faculty collective bargaining, from the organizing drive on into collective bargaining, starting in the middle 1970s until 1984, it was impossible to have a unversity-wide document that set forth the procedures applicable to the faculty. We are now in the process, with the consultation of the faculty governance body, of creating such governance documents. I like to believe that the faculty's role at Boston University is strong and will grow stronger each day because of the Yeshiva principles which we believe are operating.

ENDNOTES

[1] The views expressed in this speech are those of Mr. Rosen and are not the official position of Boston University. Mr. Rosen did not speak as an official representative of the university.

BARGAINING IN PRIVATE COLLEGES IN THE AFTERMATH OF *YESHIVA*

C. POLYTECHNIC INSTITUTE OF NEW YORK

Marvin Gettleman,* Professor
Polytechnic Institute of New York
Secretary of Faculty

BACKGROUND

The very day the United States Supreme Court announced its decision in NLRB v. Yeshiva University, 444 U.S. 672 (1980), the administration at Polytechnic, with the apparent enthusiastic support of the Corporation (Trustees), abruptly cut off collective bargaining procedures with the local AAUP Chapter. A private, mainly engineering university, once widely known as "Brooklyn Polytechnic". The school that I teach at became "Polytechnic Institute of New York" when the school absorbed the faculty of New York University's defunct School of Science and Engineering in 1972. Over considerable opposition (and evidently suffering from some sort of ongoing identity crisis), the school was recently renamed "Polytechnic University".

In 1980, as the faculty was negotiating its third AAUP contract, management (as we, if not the court call them) invoked the Yeshiva doctrine to end negotiations. Soon afterward, the Admini-Trustees also initiated a "unit clarification/decertification" action to which the local AAUP, with the much appreciated backing of the national organization, responded with a full-scale defense of he anti-Yeshiva thesis that university faculties are not managers, but employees who hire out their laborpower, including their credentialed expertise, to their employers. Offering an intriguing, plausible and (in our view) realistic alternative to the Alice-in-Academia distortions of the Yeshiva decision and its judicial and quasi-judicial clones, we defended it with every scrap of evidentiary data at our disposal producing a record of hundreds of thousands of pages of evidence and legal argumentation that might very well be the best single reply to Yeshiva.

THE YESHIVA DOCTRINE

Like the Spanish loyalists of the 1930s who had the best folk songs, but lost to Franco and his fascist allies, we may have had the better arguments, but lost the case. Bound by the terms of Yeshiva, the NLRB found not only that Polytechnic faculty had substantial managerial authority, but even that the gains won under previous collective bargaining agreements enhanced our managerial function. The NLRB decision granted the Admini-Trustees' petition to "clarify the (bargaining) unit. . . (so as) to exclude all full-time members of the faculty, including department heads, professors, associate professors, assistant professors and instructors."[1] This was clarification all right; it clarified our faculty union right out of existence. By the time the decision was announced in the late spring of 1984, much of the fight had gone out of the aging Polytechnic faculty; many of those who were not preparing for retirement took refuge in a cynicism that you could cut with a knife. As I will indicate, the low faculty morale after Yeshiva had been used against us, became a wedge later to claim some of—but nowhere near all—the power we had lost.

The fact is we mustered about all the energy we could for the NLRB hearings and had nothing left over for the kind of militancy some among the faculty advocated at the time. The Trustees also skillfully maneuvered to contain faculty discontent. At the time of the commencement of the decertification action, the Trustees, perhaps motivated by guilt in having destroyed the faculty union, or by fairness and generosity, or by the desire to dampen faculty resentment (or by a combination of all three), offered a well-received gesture of conciliation to the faculty—a ten-point agreement that at least while the matter was being thrashed out in NLRB hearing rooms, "past practices," including the 7-year AAUP tenure rule and our local three-course maximum teaching load, would not be abrogated.

Known locally at the "Ten Commendments", this agreement smoothed he way for the faculty to accept its defeat, but later it too was found to be useful in the campaign to regain a measure of faculty authority. The strategy I outline below was not thought up in advance; it was improvised out of the materials at hand and emerged over a period of months in brainstorming sessions held in the interstices of full teaching and research schedules and (for some of us) other political demands—like protesting against apartheid, SDI research and Central American escalation. The success or failure of our strategy is, at the time of this conference, still not certain. Moreover, some aspects of it must remain confidential. So what I attempt here is the mere outline of a case study in the problematique of resurgent faculty militancy.

FACULTY STRATEGY - POST-YESHIVA

Three overlapping phases may be distinguished in the Polytechnic faculty's response to our post-Yeshiva defeat. First, there was the first wave of bitterness, prompting contemplation of several initial nihilistic options including withdrawal altogether in a huff from our school's governance bodies, or even boycotting graduation. Many faculty did opt for this "internal emigration", and they are never seen at faculty meetings, decline committee assignments and do not don robes in June, etc. A second phase of resistance involved the promulgation of a doctrine as admirable in its logical consistency as it was naive in its political assumptions:[2] namely, accepting the designation of managers and then simply claiming those very substantial managerial powers the post-Yeshiva conferred on us (but which we knew we didn't enjoy). This prospect of taking over the school from a clearly inept administraton was a pleasing one to several faculty. But cooler heads pointed out that such a strategy had at least two fatal flaws built into it: first, we knew of no available managerial doctrine which could have won us back what was lost when our union was broken—the right to bargain collectively about wages and working conditions. Second, there was no conceivable way we could enforce the claims of "managerial" power without resorting to the same tactics of united militancy that our faculty had already rejected in our earlier struggles to maintain the AAUP.

So, bloodied, bowed, chastened, realizing that there was no other alternative than to go on, teach, do research, participate in the regular Mickey Mouse governance procedures, we did exactly what you would expect. We walked across the Brooklyn Bridge to grieve over our woes in Chinese Restaurants. There, over squid and jao-tse, we began to devise a third strategic option. We looked around and saw that the regularly elected faculty "leadership" was (how could it be otherwise?) the same old local AAUP leadership (minus a few bitter and disillusioned defectors) and we put our heads together to consider the meager options that were open to us. Operating on our own local resources, without the backing of a national union, we enjoyed only limited room for maneuver. Since our tactics had to be based on taking advantage of whatever opportunities were afforded by our local circumstances, the abbreviated version I present here of what may provisionally be called the "pre-Wagner Act strategy" must be prefaced by a sketch of the Polytechnic Something. The ideographic must precede the nomothetic. Lest it appear that the situation at my school is so unique that it has little relevance to other institutions, I urge my listeners to keep in mind the distinction between strategy and tactics.

The first thing that must be grasped about the Polytechnic is the disparit between its reputation, the career success of its graduates, and the serious research and, sometimes inspired, teaching that goes on there (on the one hand) and its precarious financial situation (on the other). As I shall mention later, part of our post-*Yeshiva* strategy has been to beef up faculty committees so that they can oversee the financial operations of the school a bit and this brings occasional tidbits of fiscal data to our attention, almost all of which was (and continues to be) appalling.

Obviously, something was wrong and clearly the responsibility lay with the Admini-Trustees who managed to get through the affluent '50s and '60s without substantial capital improvements, who delayed once promising negotiations to bring Polytechnic into the SUNY system long enough to scotch the deal and whose major policy success in this epoch was to bring, what they considered an effective but costly,[3] NLRB decertification action!

FACULTY-TRUSTEE RELATIONS

It was this unenviable record of administrative and fiscal mediocrity—including matters I am not at liberty to mention—rather than any ability on the faculty's part to claim "managerial" powers that provided the limited opening that we are attempting to maneuver in. The key tenet of our strategy was to make the situation at our school apparent to the only group that had the power to effect change—the Trustees. But, we first had to catch their attention. No easy task, for the Administration (in the guise of "protecting those busy men from an avalanche of paper") had virtually monopolized channels of communication with the Trustees. But, we several ways to counter this. Years before a twice-yearly joint luncheon of the Faculty's Executive Committee and as many of their Trustee counterparts who could be induced to cross the Brooklyn Bridge had been instituted and when our strategy took shape we began to use these events to better purpose—even distributing documents we ourselves had drafted (to the horror of top administration figures) to the assembled dignitaries. Some of us with few opportunities to socialize with Exxon vice-presidents, retired Chemical CEOs, venture capitalists, or builders of offshore oil rigs, found the Trustees a delightful body of men, far more realistic than the tempermental administrative mandarins we were usually forced to deal with. Practical businessmen, they were far more willing to hear bad news than administrators, whose tendency is to cover themselves and silence the messenger.

We were trying to accomplish three things in these luncheon contacts and in the other spin-off meetings. One was to counter the image of the faculty that the administration sought to impart—as grumbling, negative, ineffective types. Here, doing our homework, presenting data and policy suggestions in frank and reasonable form paid off. These luncheons also provided a forum where

Administration spokesmen (because the Trustees were present) couldn't brush off faculty contentions with the contempt they usually showed. It was at one of these meetings that, in tacit alliance with the Trustees, we got the administration, in effect, to concede that a recent long-term academic plan that they had drawn up was a fundamentally flawed document and needed systematic redrafting with continuous faculty input.

Lastly, we had to be prepared to prove to the very people who had used *Yeshiva* to destroy our union that our contention of serious faculty morale problems in the aftermath of *Yeshiva* had substance. We proposed an academic version of what as practical businessmen the Trustees were already familiar with—a management/morale study. On faculty initiative, a tripartite (Trustee-Administration-Faculty) committee was instituted to contact vendors of such studies and while its manifest charge was to hire an investigation agency and supervise the study,[4] its at-least-as-important function was to provide several months of continual contact between Trustees and faculty, establishing a basis of trust and mutual respect for the tasks to follow: the rectifying of decades of misadministration at Polytechnic and the recognition that the exclusion of the faculty from effective policy-formation was not only a major cause of the problems we were having, it was an uneconomical waste of a valuable resource.

Our self-conception is that we are fighting a holding action in an anti-labor period (much like the 1920s), maintaining a hold on part of the power faculty members once enjoyed as members of the AAUP bargaining unit, lamenting the loss of other aspects of that power (salary determination), while exploring ways of expanding our power into new areas in an emerging post-Wagner Act phase of professional trade unionism.[5]

ENDNOTES

*Former member of the AAUP Steering Committee and Professor of History and currently Secretary of the Faculty at the Polytechnic Something; founding member of hte National Writers Union.

1. "Decision and order" NLRB Region 29, Case No. 29-UC-136, May 8, 1984, p. 35. In a burst of generosity, NLRB Regional Director Kaynard refused to outright grant the Polytechnic Admini-Trustees' request that the AAUP be decertified, but added that under his unit clarification decision "certification no longer has any force or effect."

2. In an earlier scholarly work on the Rhode Island political struggle leading up to the famous Supreme Court decision in *Luther v. Borden* 7 Howard (1849), I had occasion to analyze an indigenous American radical movement that relied on a naive formulation of automatic, almost effortless legal victories that could be won when more radical tactics failed. M. E. Gettleman, *The Dorr Rebellion: A Study in American Radicalism, 1833-1849* (New York: Random House, 1973).

3. An issue too complicated to delve into here is our effort to get important financial data about the school, including (but not limited to) the question of just how much money—which otherwise might have gone into capital improvement, student services, development and faculty salaries—did the fancy legal services (the same anti-labor firm which argued *NLRB v. Yeshiva* all the way up to the Supreme Court) necessitated by the two-year decertification action cost. We know that the costs of defense were staggering.

4. In the process the faculty members of the tripartite committee—we called ourselves the Gang of Eight—learned much (as did Administrators and Trustees) about educational institutions, including our own. The data provided by the Boulder, CO research group we hired—NCHEMS—were technically superb and also upheld and provided solid basis for faculty contentions.

5. The argument that—for reasons of space-and-time limitations—I am unable to make here is that the dramatic Depression-era spurt of union organizing associated with the birth of the CIO under the Wagner Act, which set up the NLRB, now appears to have had some once-hidden, but now all too apparent costs, including excessive reliance on the state apparatus, loss of grass roots trade union elan, divergence of interests and lifestyles between union leaders and rank-and-filers, falling off in union democracy, corruption. Several new "white collar" unions such as, the National Writers Union, the Graphic Artists Guild, District 65/UAW are exploring these new dimensions of trade unionism. Even the AFL-CIO leadership, in a major reexamination of growth areas of labor organizing carried out two years ago, recognized non-shop-floor workers as a group that could help rejuvenate the troubled U. S. labor movement.

BARGAINING IN PRIVATE COLLEGES IN THE AFTERMATH OF *YESHIVA*

D. COOPER UNION

Eugene Tulchin, Professor
V. P., C.U. Federation of College
Teachers, Cooper Union

BACKGROUND

Slightly over 125 years old, The Cooper Union is today the only private tuition-free college in the United States. It stands on Astor Place in downtown Manhattan, in what was, at its founding in 1859, a very fashionable area of the city. Today the institution remains small with about 1,065 students, 600 in Engineering, 150 in Architecture and 300 in Art in the three degree granting schools that make up the institution. The schools spend $9,060 per student per year (1985) for a total yearly operating budget of approximately $10 million. The faculty consists of approximately 58 full-time and 121 part-time (or 108 FTE's). There are roughly 120 other full-time employees. The bargaining unit consists of only the 58 full-time faculty out of the 250 employees, a 1:4 ratio.

In September 1973, the latest of a series of college reorganizations was announced: the elimination of the departmental structure throughout the entire institution. In addition, the realities of the external economic scene were being manifested in large scale denials of tenure. In that era of economic stress, when it was clearly a "buyers' market", the administration of Cooper Union chose to seize the reins of power into its own hands, particularly into those of its deans. The AAUP's "Committee Z", the salary committee, was stymied as the administration would only "explain" its decisions, not bargain about them. At that time, the AAUP on the state and national level was slightly schizophrenic because it did not seem to know whether it was a union or a "professional society". Several faculty reacted to these unnecessary, autocratic measures by contacting the New York office of the New York State United Teachers (NYSUT). They were exceedingly helpful and shortly after the Christmas break petition cards were circulated. By the spring, a majority of the faculty and librarians had signed and the Organizing Committee called for a representational election.

The administration reacted quickly and blindly. First, they challenged the unit makeup and then threatened to fight us in court for years if we didn't agree to a narrowly defined unit. This caused a postponement of the election until October 1984. The first thing that the administration did was to fire ten full-time probationary (non-tenured) faculty. Not by coincidence, they were all sympathetic to the union. The President of Cooper then informed the

Faculty-Student Senate that, because there were union persons on the Senate, he need not inform the Senate of crucial data to the Senate. Furthermore, he need not listen to the Senate as it was only advisory. The Senate then advised the faculty that the issues would be be dealt with through the process of collective bargaining and shortly thereafter, it stopped meeting altogether. The administration countered with an anti-union letter writing campaign that was so virulent that it was far more helpful to the union than to the administration.

FOUR YEARS OF SURFACE BARGAINING

On October 16, 1974, an election was held and the union won. Six days later the Cooper Union Federation of College Teachers (CUFCT) was certified as the exclusive bargaining agent. The union, after some small delay, drew up its list of contract demands and requested bargaining to begin. This was met with yet another school-wide reorganization announcement, but this time there was a difference. They announced that five tenured faculty were to be fired! The physics and math pograms were to be dropped along with the Physical Ed. Department. A strike should have been called, but was not. Instead, the issue was taken to court, where the union lost: the court ruled that academic freedom was not at issue, but rather a change in program caused the firings and thus, the administration could do as it wished without consulting anyone. This remains an unchallenged and dangerous precedent. The NLRB also ruled that this was purely a managerial decision, saying that, "You can't tell General Motors when to stop producing Vegas." Two of the positions were eventually saved.

With this horrendous start, things only got worse. The administration took one outrageous position after the other; for example, the union couldn't have any bulletin boards because the trustees owned the buildings! They stalled on all exchanges of information, they refused to bargain after 5:00 p.m. and they refused to bargain about any matter that was not obviously directly related to wages and hours. Their objective was to extremely limit the scope of the contract and to drag out the process to the point where the union would be exhausted.

Another method of attack was to "deal" with our members through the various governance committees in an attempt to undermine the union position at the bargaining table. Their position was that the faculty committees were a managerial responsibility and therefore, they refused to bargain about them. Though we often held a majority position in these committees, it was a constant struggle. Unfair labor practice charges along these lines were, after much delay, sustained.

The union requested federal mediation and reluctantly, the administration agreed. Some progress was briefly attained during this time, but it was short lived: the CU administration broke off all negotiations with the union when a company stooge filed a decertification petition against us. Though this petition was eventually thrown out, it was cause for substantial delay. The hostility and acrimony that built up over more than four years of struggle had a severely deleterious effect on the institution, with a demoralized faculty and a stagnating educational process. External accrediting agencies, in private reports to the administration, noted the low morale and excessive administrative power. Finally in April 1978, we reached a contract. The union, like a pebble in a shoe, could be ignored for just so long: eventually, they had to deal with us. Tenacity is a CUFCT hallmark.

THE COLLECTIVE BARGAINING AGREEMENT

The contract we reached had substantial benefits for our faculty and librarians. We achieved major salary increases, alleviated many inequities and received back pay increases even for departed faculty. Governance was changed and a strong grievance (arbitration) procedure was created. On the whole, it was a solid contract, providing a workable platform on which, we believed, the union could build. During the life of the contract, no problems arose that were not settled internally and outside the arbitration was not needed. The administration learned how to work with a unionized campus and the academic environment slowly began to return to a more normal, collegial work place. The salary clause was reopened after one year and, except for the normal friction, was successfully concluded. Substantial gains were made.

During the last year of the contract, the president of the school retired. The new President, Bill Lacy, assumed office on January 1, 1980. He assured the newly functioning Senate that he would have "no difficulty" in working with a unionized faculty and he told the union's executive board that "there was no aspect of the contract" that he "could not live with". Thus began the big lie! On February 20, the Supreme Court ruled on Yeshiva. By June 26, 1980, the union was Yeshiva'd.

Ten months later, in April 1981, the NLRB issued a complaint against Cooper Union. An additional eight months were to pass before the trial began in January 1982. It took eighteen months from the time we were Yeshiva'd to the trial. It took an incredible additional twenty-three months, December 15, 1983, for the ALJ to rule — against the CUFCT! Fourteen months later, February 1985, the ALJ was reversed by a unanimous Board in Washington. Not until January 30, 1986, eleven more months, did we achieve the final, we think, victory when the Second Circuit of the U. S. Court of Appeals issued a unanimous, unsigned, decision in our favor. For five and a half years, the CUFCT, NYSUT, AFT, the AFL-CIO and the Central Labor Council of New York City fought this case. Their unstinting aid was of inestimable value.

THE YESHIVA DECISION AND ITS AFTERMATH

The Yeshiva decision by the Supreme Court was a political decision. It was primarily the flatulent after-odor of the Nixon/Ford years of anti-labor gluttony. It resulted from a bad case, gleefully seized upon by a vengeful Nixonian majority of the court, finding within this case an excellent opportunity to get back at those liberal academics who made up a substantial part of the "Enemies List".

HOW THE UNION VICTORY WAS ACHIEVED

Our victory was achieved through an extraordinary amount of hard work and cooperation, trite though this may sound. The trial before the ALJ lasted two full months without interruptions. NYSUT provided two attorneys in the courtroom as did the NLRB; in the lengthy discussions between the various attorneys and union officers, it became clear that no one understood the meaning of the Supreme Court's decision. It is axiomatic that bad cases make bad law and bad law makes unintelligible decisions. No matter how often the Yeshiva decision is read, it remains unintelligible. What was clear to all of us was, however, that in the real world of real people, the ordinary professor at a normal university was not part of management. What we needed to establish therefore was that we at Cooper Union were the normative condition and that the alleged conditions at Yeshiva University were aberrant.

Rather than pursue a particular legal interpretation of the Yeshiva decision, we decided that the union's best plan of attack would be to lay out as full and complete a record as was possible. Teams of faculty were organized to brief our lawyers on all the byzantine complexities of Cooper Union's torturous history. Each and every aspect of the school was laid bare and a total history was detailed. Every nasty memo from the administration was dredged from the files, every plaintive bleat of frustration from the faculty was unearthed and all went into the record. All of the institution's dirty laundry was exposed to the cold light of day. Members of the faculty from each school and from every area of instruction gave a detailed presentation to all of the attorneys and later testified at the trial. The faculty amassed documents by the hundred weight to buttress the case. The CUFCT had no lack of expert witnesses to testify. They were all well prepared and each had done very extensive research. They participated, not only as witnesses, but they helped in the "back room" work of the trial as well. The transcript passed 7000 pages. Over 1000 documents were entered.

Ten full-time faculty testified for the union, none testified against. Only the vice president, dean of admissions and dean of students testified for the administration. No academic deans testified. The administration was clearly afraid to put them on the stand. At the trial's end, the faculty actively participated in formulating the briefs. The tripartite structure of NLRB attorneys, NYSUT attorneys and CUFCT faculty cooperated well and their collective hard work was the foundation of success.

The CUFCT believes that the Cooper Union is a normal, typically mature, academic institution. It has a fairly wide-ranging governance and the normal range of academic committees. Our faculty members do what teachers traditionally do. They plan their courses, deliver lectures, grade papers, prepare exams and pursue research in their chosen fields. Their habitat is the classroom or the library, not the Administration building. The Cooper Union is, and has been for 125 years, a major force in American higher education. We were able to prove that this was true and in consequence beat the Yeshiva decision. We believe that we have demonstrated that Yeshiva University is the anomaly in American higher education and that we at Cooper Union are the norm.

V. ISSUES IN COMPENSATION

A. MERIT PAY AND MARKET ADJUSTMENTS

B. SALARY INCENTIVE SYSTEMS

ISSUES IN COMPENSATION
A. MERIT PAY AND MARKET ADJUSTMENTS

Linda Tom
Director of Employee Relations
University of Delaware
and
C. Harold Brown
Vice President of Personnel
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INTRODUCTION

The issue of appropriate pay is among the most difficult and controversial in labor relations. This discussion focuses on merit pay and market adjustments for a unionized faculty at the University of Delaware.

It is unusual to find acceptance of merit pay and market adjustments in union environments. Merit pay and market adjustments are by their nature selective to individuals. Unions are political entities and as such, negotiated rewards are expected to accrue to the voting majority. Allocations of pay increases to a limited segment of the membership can potentially create dissension and will not generally win support.

The University of Delaware ("Delaware") may be somewhat unique in that these issues were addressed early in its bargaining history and resolved in favor of allocating some portion of salary increases on the basis of merit. The faculty at Delaware have been represented by the American Association of University Professors (AAUP) since 1972. The earliest negotiated contracts included provisions for merit pay increases. Further, as a practice, salary adjustments were implemented for market equity.

I. MERIT PAY

The rationale for merit pay is to recognize performance. The position taken is that those who do more should get more. The recognition factor is viewed as significant. Those opposed to the concept of merit pay argue that it is inappropriate to distinguish among colleagues on the basis of performance because such judgements cannot be made in an objective and fair manner. Another argument against merit pay is that when overall salary increases are small, it is inherently unfair to differentiate. Although these arguments were made, the negotiated position at Delaware was to accept some level of merit pay increases.

In negotiations, a continuing source of tension was in the determination of what portion of salary increases should be allocated across the board (ATB) as opposed to merit. Generally, the union pressed for more ATB increases while the administration wanted more in the merit pool. The faculty, as a group, was divided on this issue. While many favored ATB increases, there were a very vocal element that supported merit increases. Typically, the smaller the amount of total funds available, the greater the resistance of the AAUP to merit allocations.

It is interesting to note that many Chairpersons and Deans were reluctant to differentiate on performance for merit allocations when total salary increases were limited. Generally, when the total salary pool was small, the ATB portion would be higher than the merit portion. The most frequent situation was that 50 percent of the negotiated salary increase monies would be allocated ATB and 50 percent would be allocated to the merit pool.

A. Implementation

Each college received the same percentage increase from the merit pool based on faculty salaries in that college. Deans made allocations of the merit pool to departments. Decisions on an individual faculty member's merit increase was made by the Chairperson. This was based on the faculty member's performance in teaching, research and service for the previous year.

To implement merit salary increases effectively, it is essential for the parties to establish workable procedures. Three key factors are important:

1) establishing a well defined performance appraisal system;

2) obtaining consensus on the criteria to be used in the evaluation; and

3) clear communications among all parties.

The following language is contained in the Delaware contract regarding merit pay and its relationship to performance.

> Merit pay increases shall be awarded in a fashion which is consistent with the faculty member's performance as reflected in the annual evaluation conducted by the department chairperson or dean....The annual evaluation shall be based on criteria which have been clearly communicated to faculty members in advance of the period covered by the evaluation and which are consistent with the work load plans developed....The chair or dean shall communicate to each faculty member in his/her administrative unit the basis for the evaluation. Merit increases are to be awarded solely on the basis of past performance in research, teaching and service....

Measures of criteria and weights assigned to each criterion are determined by the faculty in each department. Therefore, how these concepts are applied can vary among departments. Agreement on the criteria and clear communications between the faculty member and administrator are essential.

B. Problems

Perhaps to be expected, the allocation of merit pay has been a source of grievances over the years. Issues often involved alleged inconsistent relationships between merit award and performance appraisal. The most extreme example of this was when a faculty member with the highest performance appraisal in a department received the lowest merit pay increase. In this instance, the Chairperson's decision was reversed through a grievance decision.

As a matter of principle, the administration established the position that there must be a "reasonable" relationship between performance appraisal and merit pay increase. There did not, however, have to be a numeric one-to-one relationship between appraisal scores and percent salary increase. This position was supported in an arbitration decision.

In most instances, problems were caused by poor communications and/or poor relationships within the administrative unit. For example, a faculty member grieved a low merit pay increase when told that he had not generated sufficient research monies. The faculty member argued he had not been informed, prior to the evaluation period, of the expectation to raise research funds. The ultimate question in this grievance was not whether the criterion was appropriate, but whether the expectation had been clearly communicated.

C. Impact

Inclusion of the relationship between performance appraisal and merit pay in the collective bargaining agreement has had a number of positive effects on management practices. Specifically, the process of faculty evaluation is taken more seriously. Chairpersons and Deans know that decisions in this area can be the basis for a grievance. As such, appraisals and salary increases are handled much more thoughtfully.

Information regarding these matters has become much more accessible to faculty and the AAUP. Initially, there was some conflict concerning information requested by faculty in processing salary grievances. Care had to be taken to assure confidentiality of appraisals and salary increases of individual faculty. Methods were developed so that information could be generated for understanding the grievance without infringing on confidentiality.

An interesting spill-over effect has been the development of a greater sensitivity to the relationship between annual evaluation and the promotion decision. Criteria for annual evaluations and promotions are the same. Administrators, when applying evaluation criteria each year, have to be aware of the cumulative effect on the longer term promotion decision.

Communications between faculty and administrators have improved around salary issues. This resulted from clearer contractual guidelines and a better understanding of contract intent.

The labor-management relationship at the University is relatively mature. There have been efforts between the AAUP and the administration in collective bargaining training activities. An earlier program was developed and implemented on grievance handling and contract administration. Another program was developed on performance appraisal and merit allocation. These programs were attended by administrators, AAUP officers and departmental representatives.

While there have been problems with the inclusion of merit pay in the collective bargaining agreement, the problems have been sufficiently addressed. In general, merit pay is working well at the University of Delaware.

II. SALARY EQUITY/MARKET ADJUSTMENTS

In addition to merit pay, the University of Delaware Collective Bargaining Agreement also contains a provision for market factor adjustments. The administration has taken the position that to respond effectively to market conditions or equity situations, unique salary adjustments are sometimes required. These increases are implemented independent of negotiated salary adjustments. While the union has questioned this practice, it has not been strenuously challenged. It was recognized that matters of equity and demands of the market were problems for the union as well as the administration. Conversations and questions around these issues were brought to the bargaining unit over the years. Eventually, the parties agreed to language in the bargaining contract. The particular provisions are as follows:

> It is recognized that the situation may arise which will make it necessary for the University to make special salary adjustments for individual faculty members in addition to annual increases.... Such adjustments may be implemented by the University under the following situations:
>
> 1) when a salary adjustment is necessary to correct a gross inequity;
> 2) when a salary adjustment is necessary to retain a faculty member at the University;
> 3) when salary disparities occur, relative to market demands, which adversely affect the quality of an academic unit.
>
> Salary increases may not be awarded to members of the bargaining unit other than that as required or permitted by (this article) without prior discussions with the...AAUP.

It was also agreed in the contract that:

> ....the University will provide an annual report to the AAUP summarizing all special salary adjustments awarded ... during the preceding year. The report will indicate the number of special increases granted in each unit and the reason for each of the salary adjustments granted.

Requests for unique adjustments are initiated through administrative channels. A Chairperson or Dean makes a request, with appropriate justification, to the Provost. In some instances, when such increases are implemented, salary compression can be a problem. To address compression problems, adjustments to other faculty salaries may have been necessary and were implemented as appropriate.

Successful implementation of merit salary increases and market adjustments at the University of Delaware can be attributed, in large part, to the level of trust developed over the years between the AAUP and the administration. Merit pay increases and market adjustments have worked at the University of Delaware because of the effective manner in which contracts have been administered over the years.

ISSUES IN COMPENSATION
B. SALARY INCENTIVE SYSTEMS

William S. Brown
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As enrollment continues to decline in higher education, and budgets grow tighter with spiraling operating costs, higher eudcation administrators have become concerned with the need for increased productivity and accountability of faculty and staff. Balancing this desire to improve "the product" that the institutions produce, with the spirit of collegiality that historically exists within the academic community, is a challenge from which many administrators shrink. However, growing financial problems throughout higher education make this a dangerous fiscal policy to assume. The purpose of this paper is to discuss some theories and methodologies by which a more fiscally responsibly approach may be taken to salary expenditures at institutions of higher education. What follows may not be applicable at every institution, and a sound pay system is one that is tailored for its own unique environment.

SALARY AS A MOTIVATOR

The attempt to motivate increased productivity, both within the administration and the classroom, is not well served by simply increasing salary lines with higher general increases for all. The manner in which compensation is applied can have an effect on the productivity of the employee. An intelligently designed, implemented and administered compensation system, in concert with other well designed non-salary compensation programs, can go far toward answering an institutions needs. It should be remembered that it probably took many years to create the problems of lack of productivity and apathy so it seems unlikely that these problems can be solved overnight.

Human motivation, being what it is, is a highly complex subject. Motivation within the work place is even more complex due to the interaction of individuals within the task of accomplishing the goals and objectives of an organization. This is further complicated by management style or philosophy endemic to the particular organization in which these interactions occur. There are literally hundreds of theories of motivation. Salary alone cannot be considered when discussing the impact of motivation in the organization.

The concept of total compensation must be considered when approaching organizational behavior. The total compensation package, including salary, time off, benefit programs, perquisites and, most importantly, symbolic uses of compensation can touch many needs of the individual in an organization and have a high motivational potential. Often, especially in an academic environment, non-financial rewards which address esteem, recognition needs and indirect compensation have greater motivational potential than direct compensation.

The total compensation package consists of both financial and non-finanical rewards. Financial compensation can be broken down further into direct compensation such as salary, bonuses, honoraria, etcetera and more indirect forms of compensation. It is these indirect methods of compensation that can address many of the needs mentioned in the classical motivation theories. This may include pay for time not worked, vacations, sabbaticals and perquisites such as parking privileges, laboratory equipment and computer time. At Barnard, I think a fair statement would be that most faculty and administrative staff would take a parking place rather than a sabbatical. These kinds of perquisites given in addition to the normally granted benefits and salary can have surprisingly positive results. Non-financial compensation includes official recognition in such a way as to meet esteem needs and elevate the individual in the eyes of his or her peers.

THE EQUITY THEORY

Salary, however, has the greatest impact on the individual's lifestyle. It is, therefore, the focal point of most research on compensation. Differing employee groups perceive the importance of salary in a variety of ways. An employee's perception of pay as equitable within the workplace is truly critical to the motivation and satisfaction regardless of what the salary may be in relation to the market place. So it is predominantly a matter of communications.

The equity theory, which I'm sure most of you are aware of, has been the subject of much attention in the research literature on motivation. The essence of the equity theory is that when an individual perceives an apparent inequity in a compensation situation, the individual will take action to reduce the perceived inequity. There is a direct relationship in the strength of motivation to the degree of the inequity perceived. In an organizational setting, individuals will compare their own effort, remuneration, recognition, achievement and satisfaction with a self-defined reference group to determine if equity exists. When an inequity is perceived, appropriate behavior modification will result to reduce the perception of inequity.

The methods by which perceived equity can be obtained are many including increasing or decreasing productivity and effort. Removing oneself from the situation by absenteeism, resignation, or "on the job retirement", and influencing others in their own reference group to increase or decrease their productivity and effort to meet the perceived equitable standard are illustrative of this point. In regard to compensation, those who perceive general increases as rewarding mediocrity will adjust their effort downward to meet the perceived inequity level. Whereas, in cases where substantial rewards are given for high productivity, individuals will adjust their efforts upward to meet that perceived inequity. Hence, perceived overpayment as a reinforcement for desired behavior should lead to increased productivity and increased quality of performance.

A theory closely related to the equity theory, which should be considered when putting together a total compensation package, is the expectancy theory. Summarized, this theory reports that the motivational drive or effort is directly related to the expectancy of the individual with respect to the outcome of their effort. The value attached by the individual to the specific outcome is important to them.

INCENTIVE SALARY SYSTEMS

In the academic environment, some observers feel that seeking increased productivity and improved compensation in the faculty ranks forces them to enter into a philosophical quagmire from which there is no escape. However, clearly something needs to be done about both the method and reward for remuneration for faculty as well as increasing the quality of the "product" produced by institutions of higher education.

The professional literature is replete with articles bemoaning the state of higher education and calling for increased productivity and increased educational effectiveness. To call for more productivity and effectness is fashionable. Less fashionable is the desire to reward excellence when it occurs within the educational environment. It is a fact that more than fifty percent of faculty who teach in an institution of higher education have no opportunity to earn additional income. This exacerbates an already critical problem because over one-third of these educators are earning a salary below the national average family income.

Faced with the reality of declining enrollment, financial adversity and decreasing student skills, some theorists are calling for a reexamination of the traditional administrative approaches for governing higher education in general and specifically for the use of financial rewards as an incentive for improvement of research and teaching. Many institutions have begun early, partial, and fazed retirement programs, in addition to buy-out programs with their faculty, to create artificial growth within academic ranks. This addresses, in part, the need for recognition amongst the lower level faculty. One institution has established a career redirection for faculty as part of a larger multi-option faculty development program. For those remaining in academia, the question continues, how to promote and reward excellence.

Two analysts have called for revitalization of the reward structure for academics that differ from the current one which disproportionately emphasizes research and publication over teaching.

Only through innovation and original thinking in revising the faculty reward system can increased productivity, creativity and new stimulation be induced. One such attempt at innovation is to establish a compensation plan which will be an incentive to excellence in those areas relatively measurable. As part of this process, some form of evaluation is required in several areas impinging on a faculty member's ultimate success. Many plans have been put forth by numerous theorists but most center around a peer review and/or a dean review or, department chair observation.

Evaluation methods are something which must be tailored to individual institutional needs and their own individual environment. However, areas in which achievement of excellence is to be encouraged are fairly common from institution to institution. Teaching ability, research and publication, and of course, institutional service. Inevitably, rank and/or seniority must enter into the process if the faculty is organized into a collective bargaining unit.

An incentive compensation plan rewarding excellence in these areas may be designed and implemented to supplement a guaranteed base salary. As in other incentive plans, base salary should be set at a predetermined level slightly below the market rates so that the minimum acceptable performance standard or threshold performance in the plan must be met for the individual to earn the average market rate. Superior performance will then be rewarded at a rate above the going market rates.

In implementing this type of plan, an institution taking this action has to decide to innovate the compensation of faculty by rewarding excellence in those areas of productivity that are important within the culture of that particular institution. Rank, which is of course a function of longevity, currently, teaching ability, publications research, and institutional service may be selected as the reward categories. Performance standards for threshold performance through outstanding performance should be defined and a reward pool determined as a result. The reward pool is then divided by the number of faculty members eligible to participate to determine the potential maximum reward per faculty member.

If I could give you a quick example. Picture four categories; rank, teaching rating, publications research and institutional service. In the rank column: professor, associate professor, assistant professor, instructor and lecturer. Under teaching rating, you rate outstanding, excellent, satisfactory, threshold and below threshold. In all three categories under teaching rating, publications and research, and institutional service, you would rate outstanding, excellent, satisfactory, threshold and below threshold. You can weight the rewards in this type of system towards whichever one of these three categories is most important to the particular institution. In this case, I've chosen to reward teaching rating and publications research equally and institutional service less.

Thus, if we have an organized setting, rank and longevity is important. You can reward a professor 20 percent of the pool, an associate professor 15, assistant professor 10 percent and instructor 5 percent; thus, as a matter of longevity, someone will get something. They won't get everything. Under teaching rating, you can weight the outstanding at 30 percent, outstanding on the publications and research weighted at 30 percent and institutional service at twenty.

Thus, a professor who is outstanding in teaching, in publications and research and has had outstanding institutional service will get 100 percent of the average reward pool. If there's a $100,000 pool, 100 faculty members, you have $10,000 as your average reward or maximum award per faculty member. This professor who is outstanding in teaching, publications, and institutional service would receive an additional reward of $10,000 on top of a guaranteed base.

Those at lower levels of performance will receive less. Those below threshold performance would get zero. They would come in with an annual salary of less than market value which, of course, is supposed to modify behavior toward the postive side of base line behavior.

Clearly though, with the trends of lower enrollment, low faculty morale, decreasing student skills, a reduced work force and reduced opportunities for mobility, something needs to be done to innovate the system of reward. This is just one modest suggestion.

VI. BARGAINING WITH "NONTENURE TRACK" FACULTY

A. THE MASSACHUSETTS EXPERIENCE

B. THE CALIFORNIA EXPERIENCE

C. THE CANADIAN EXPERIENCE

BARGAINING WITH "NONTENURE TRACK" FACULTY
A. THE MASSACHUSETTS EXPERIENCE

Arlyn Diamond, Assoc. Prof.
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Pres., NEA Local, Mass. Society of Professors

BACKGROUND

The University of Masschusetts has two campuses, one of which, Amherst, is a research university and the so-called flagship campus. It has about 25,000 students, a number of graduate programs and some 1200 faculty in the bargaining unit. Boston is a newer urban campus, primarily a commuter college and has about 500 faculty. We have one contract for both institutions. The reason I make a point about our being a university is because, theoretically tenure track faculty at a university are evaluated on a tripartite system; teaching, service, and so-called research or scholarly activity. Yet, as we all know, in practice what really counts is your national reputation, scholarly activity and research. How many articles in refereed journals have you published in the last year? How much grant money did you bring in? The tendency in all universities is to collapse that division into one with an emphasis on scholarship and research.

THE MASSACHUSETTS SOCIETY OF PROFESSORS

We're about ten-years old as a union. We just had a tenure celebration. I thinks it's fair to say that professors at research institutions are among the most independent privileged faculty; primarily those with doctorates, white and male. They see almost no reason to think of themselves as workers, or to organize, unless, as in our case I think, the institution itself is under attack. We went four years without a raise and essentially, without new-hires. I think that without those extreme conditions we might never have unionized. You have a professoriate which thinks of itself as separate and special, apart from any concerns about being a worker.

On the other hand, those most likely to organize, as opposed to giving up the profession as a whole or going elsewhere, are those with the most institutional commitment. In some ways, this means the most conventional faculty. In our case, it was the regular full-time tenured faculty who organized the campus. They are the ones who have, in essence, continued to lead the union. They're not the most depressed group but those with the greatest sense of what their rights are. Their most intense reaction occurs when they feel their rights are threatened; that includes their right to run the place and to determine what the institution should be like. Regular faculty are in a position to stick to a long campaign and do union work. As we know, union work is time-consuming and, in some cases, leads to possible vulnerability. We will not let untenured bargaining members serve on the bargaining team. We do not encourage them to serve on our most demanding committees or in leadership roles because we know that if we want them to stick around, they are going to have to publish. What that means is that the people who are running the organization are not the nontenure track faculty.

There is a greater problem that goes beyond the question of representation. By and large, regular tenure track faculty believe in the merit system. We have a merit system because at least half of our faculty believes intensely in it. They believe that they have remarkable qualities and that's why they are where they are. That's why they got tenure and somebody else didn't, because they're better. These are the people who serve on personnel committees and who make judgments on merit and tenure. We all know that there are problems concerning peer review and merit, but these are the issues the faculty feels strongly about. As a consequence, our faculty members are not likely to see themselves in solidarity with the lesser ranks. There is truly a hierarchical structure. We have fought this out, not only with nontenure track faculty, but with librarians who are in our unit. We still have a few members, fewer every year, who say, "Why are librarians in our unit? They're just here to serve us." When it comes time to bargain or to integrate their issues into ours, both librarians and part-timers have felt, with some justice, that in the end their issues tend to get traded away. When it comes down to close the contract there's a tendency to give on those issues.

I think that if I were to analyze this issue, it is because we operate like a medieval craft union. We have our kind of hierarchy; we have apprentices, we have journeymen and masters, and the only way to succeed is to progress up this scale. We emphasize the hierarchy, privileges, virtues, knowledge and wisdom of those who run the system. We tend to separate ourselves from our work and perceive our power as resting in our ability to exclude others from the profession. We make distinctions on our individual power rather than our ability to work collectively. We don't think of ourselves as a trade union. We don't understand that as faculty we are employees, along with clerical workers, custodians, professional staff, librarians and part-timers, of the same system.

BARGAINING ISSUES FOR "PART-TIMERS"

What faculty need to do to address this problem is to give up the notion of a craft union and think about becoming more powerful as institutional workers. We do represent professors, associate professors, assistant professors, instructors, faculty of the Stockford School, program directors, nontenure track faculty, (we don't say what that means or who those people are) lecturers, full-time visiting faculty, so forth and so on. Perhaps the most significant groups of nontenure track faculty that we represent are lecturers and part-timers.

The local facts, the context in which I'm speaking is that the part-time faculty primarily exist on the Boston Campus. Out of the total faculty there are about 350 part-timers at Boston and about 100 at Amherst. Yet at Amherst, we have over twice as many faculty as Boston. However, the issue is seen primarily seen as a Boston problem. In a location like Boston you have a huge pool of graduate students and people who are otherwise under or unemployed and who want or need to stay in the area. They are well qualified, I would say in many cases overqualified, for the kind of jobs they hold. So at the Boston campus the part-timers are over one-fifth of the faculty.

The last contract mandated a part-time commission of three faculty and three administrators to study the problem of part-time faculty and to come up with recommendations for this contract. Unfortunately, the Boston administration didn't participate, refused to provide information and didn't come to meetings. There is now a commission report which was primarily a faculty group composed of part-time faculty and regular faculty. A survey was distributed to about 450 part-time faculty; 150 responded. We discovered that only about a sixth of those were doing graduate work which means that graduate status does not account for the high turnover of part-time faculty. We have to look for reasons elsewhere. Two-thirds of part-timers have other jobs, often also part-time, which means that they are really operating on the fringes of the system. Only about a third of those would like full-time appointments. This group appeared to be much more qualified, and much more dedicated, than the university has any right to expect.

Part-timers are distinct from lecturers. You can only be a lecturer for five years. It is a terminal position. In fact, it's not true that people are only lecturers for five years but, in theory, are supposed to be. Part-timers are an invisible group. Most of us don't know who they are, where they are, who choses them and on what basis. They're horrifically exploited. We managed to raise their minimum for a course up to $1800. Most of them don't have any kind of fringe benefits at all. They are primarily female and have minimal job security. This is an affirmative action issue. One of the reasons it's so easy to exploit these people is because, as the Carnegie report shows, the professoriate doesn't believe in affirmative action. Many suspect that women who wish to teach at universities are only doing it for pin money, are not as good, are not real professionals, and so forth and so on. Therefore, they are much more reluctant to see them as colleagues.

Our report indicates that, in the short run, and only in the short run, the regular faculty profits from the exploitation of part-time faculty. The part-time faculty teach the introductory courses which enables the university to reduce the course load for the regular faculty. It also means that there is more money for higher salaries for the regular faculty. Out of a somewhat limited pot of money, a group is able to wring out profits from the labor of others. It sounds classic. There are tremendous long-range consequences for the faculty which the regular faculty has to be made to understand in order to get anywhere on this. When it comes to service you cannot expect these people to serve in the day-to-day participation of faculty governance. They are not able to do advising because they don't have a long enough contact with the university to be able to advise students about its resources. They are not there for students to come back to speak with later on. The University of Massachusetts at Boston has a retention problem. It is obviously connected to the fact that there is such a high turnover in the faculty that the students initially meet. The power of the core faculty withers away if there are fewer and fewer of them and they are replaced by cheap labor. There is also the further question of the loss of excellent people to the professoriate as people get discouraged and leave.

Part-time faculty are often characterized by workload and yet the fact is there is no rational approach to workload. One of the things we discovered is there seems no principle by which a full-time faculty line is divided up into part-time lines. Eight or twelve or sixteen part-time lines are divided on one full-time line. You have a faculty member who teaches two courses a semester and makes $54,000 a year on a full-time load. You have somebody who teaches two courses a semester and makes $7200 a year on a part-time load. Now either you are arguing that there's $47,000 worth of service and research being done by this individual or, you have a very irrational position.

UNION STRATEGY AND PROPOSALS

I've suggested a number of problems, I'd like now to suggest a few solutions. There are two different kinds of imperatives or goals here; one is academic and the other is a union issue. We have to have a serious discussion about part-timers, not as a fiscal issue but as an intellectual and pedagogical issue. What is it that we want to do? Is our long-term strategy to eliminate this category except for a few exceptions? Is that what would be best for the university? Or, ought our long-term strategy be based, not on the grounds of saving money, but on the grounds of doing what a university is supposed to be doing and stabilize these positions and not try to transform them into full-time positions but to make them into decent worthwhile positions. This issue has to be publicly debated and understood within the framework of the long-term goals of the union before it can be can discussed on acdemic grounds. We're not bargaining for these people on the basis of charity. That's not the way unions are to work.

The union imperative is such that you have to represent your members fairly. You have to ensure that they are not exploited, that they have decent jobs (and that means job security), decent pay, fringe benefits, fair evaluation, and collegial treatment.

There are two strategies, as I understand it, that unions have used to address this problem. One is to set up quotas to limit the number of part-time faculty. In the short run, that is perhaps the necessary strategy. In the long run, I think the solution is to make part-time work expensive, that is, to make it justified on other than fiscal grounds.

1. You have to start organizing the part-timers, if they're not already.

2. You need to begin information gathering through surveys and committees about your nontenure track faculty.

3. You need contract language which provides some seniority and continuity of employment.

4. You need specially designated slots on your executive board and bargaining teams for part-time faculty.

5. You need to look for ways to ensure interaction of these people with regular faculty, including designating their representation on personnel committees and other campus committees.

6. You need to define and regularize such positions. For example, we have a proposal which suggests three kinds of part-time positions; teaching, teaching and advising and a part-time regular position, which carries a kind of pro-rated expectation of scholarly productivity to decide where somebody stands and what you want these people to do.

7. You need contract language on appropriate evaluation and retention procedures.

In doing that, you need to decide whether you want to designate special articles in the contract solely for part-timers or do you want to integrate them into the rest of the contract. We have special contract articles that seem to work best for us but I think it might not be the only solution.

Finally, and this is the most obvious but, perhaps in some ways, the toughest, you have to be willing to say that they are as important as bargaining for full-time people.

BARGAINING WITH "NONTENURE TRACK" FACULTY
B. THE CALIFORNIA EXPERIENCE

David Averbuck, Lecturer
University of California
Northern Vice President
University Council, AFT

ORGANIZING THE UNIT

There are approximately 2500 members in our bargaining unit. On some campuses, we teach over sixty percent of the lower division undergraduate courses. We also teach graduate courses in the professional schools. We are used for a multitude of purposes. We see ourselves as the teaching faculty. Although we are not required to do research, in reality, if we don't do research, we're gone. Our average turnover is every four years. We lose eighty percent of our membership in four years. Think about the difficulty in keeping that organization organized when you have that kind of turnover. It's like trying to organize your students in a four-year university. Every year you are looking at another twenty-five percent that you have to get down and go to work with.

Our overall goal when we started organizing in collective bargaining at the University of California, was to eliminate the disparity of treatment. Two problems became major issues in the decision to organize. First, our lecturers, which are some part-time and some full-time cannot work after eight years at the University of California because of the "eight-year rule" of more than fifty percent time. That was one of the major things that we had going for us in our organizing effort and in getting the vote done. A second organizing issue concerned discrimination. Sex and race discrimination is replete at the University of California. Over fifty percent of our nontenure track faculty are women and minorities. Less than twelve percent of the women are tenure track faculty. At the rate that the University of California is going at Berkeley, it will take thirty years to have parity between men and women.

The University of California is a nine-campus system with Berkeley and UCLA as our two shining lights. You are looking at a very powerful, rich system in which approximately four billion dollars a year is pumped into it in either private or state funds. They have an operating budget that is astronomical. You're looking at a multinational corporation stuck in a time warp of the past. It's because of that we were able to make some inroads and because there is a degree of enlightenment taking place at this time.

In any event with those minorities, and with women being exploited, we had the votes available for us to win the election. We are in our second year of collective bargaining now and still do not have an agreement—that's absurd.

Our average pay is approximately $13,000 a year. We've been in bargaining for two years and the University of California has not put a salary proposal on the table. Two years! The University is ripe for suits; for unfair labor practices over pay bargaining and for EEOC sex and race discrimination claims. That's how we see it. How do they see it?

They see us as different for each campus. Each campus uses us differently. Berkeley sees us as a group of outstanding scholars and goes out of their way to give us benefits. They make us earn enough hours to get benefits and give us a low course load. Some departments give us a voice where at least we have input. UCLA sees us as cannon fodder. Let's use them to teach the undergraduate courses. Then we can go out and raid the University of Massachusetts and bring this woman back to UCLA and promise her she won't have to do any lower division teaching. She'll teach graduate courses only. If she's in science, we'll give her the best labs. She can do her lab and we'll let these other peons do the teaching. What you're really seeing is a struggle, not only between tenured and nontenured faculty but between the whole concept of what a university is about. Is it teaching or is it research? At the University of California, research means money, big money. That's the battle. I think the lecturers carry the program. The promise is that you're going to get Nobel laureates yet they don't come to the classes.

At the University of California, we have a unique problem because Article 9, Section 9 of our State Constitution as it now stands, gives the Regents complete autonomy over us, shared in part, with the legislature except for one fact—the legislature can control the University by its budget.

COLLECTIVE BARGAINING TACTICS

The University is split between two groups—an administrative faction and an academic faction that is the Academic Senate Faculty. The Senate Faculty sees us as a threat to them. The senate hasn't been educated as to who we are and what we do. That's our failing. The administration on the other hand, is very leery of the role that we play. They don't understand us. In fact it has taken them almost a year and a half to two years to get an idea of who we are. One of the things a bargaining agent has to do is start educating the administrators and faculty of who the nontenure faculty are. That means you have to do some homework and some data gathering. You have to come up with the statistics. The University of California, after a great deal of prodding, finally did a complete survey on us after a year into collective bargaining. From that data, we have been able to start reaching agreements on things. I am hopeful that by the end of this academic year we will be able to have a collective bargaining agreement.

Nontenured faculty are difficult to get to strike. The administration can always find people who can take their place. In California, we now have the right to strike. Our State Supreme Court has ruled that we have this right, but frankly, we are not capable of pulling off a strike. We don't have the organization or the membership to pull it off.

There are, however several ways in which we can hurt the University of California; nothing new, nothing brilliant. Number one, is money. Money means we have two sources on which we can attack them. If we can make inroads to them in those two sources, we can hurt them. One is the legislature, which turns over $1.6 billion a year to them. The second one is their fund-raising with the alumni. Unfortunately for the University of California, they publish all their alumni lists so you know how to reach everybody. The second avenue of approach you can use against them is pressure, both in and out of the collective bargaining relationship. Another option you may have other than money is prestige. They hate to think of the Chronicle of Higher Education publishing an article. In fact, what we have had to do is hold back publicity because we know that once we do start publicizing, we polarize the entire situation. It's kind of there as a "dooms day" device. You have to have a sense of when to use it and when not to use it. It's very delicate. Those are the areas in which you hurt a university and bring them around in terms of pressure.

PROBLEMS AND TACTICS

The University's made some wonderful moves but they've also made some mistakes. I want to point out some of their mistakes and problems and some of ours.

The University made one drastic mistake. They pushed for a system-wide unit of nontenured faculty. Once they did that, and we went along with it, we were in an excellent position (once we won the election) to whipsaw them in a multi-unit situation. Not only are you able to whipsaw between one campus and another, but most important of all is that there are certain tactics you can use on the administration that will force them to finally make decisions—sit down and start collective bargaining. Other problems included the following:

1) One issue that we faced is that we are a multi-campus system in which the nine campuses all thought they had a little fiefdom going. In fact, that was part of the history of the University of California, to give that autonomy, to turn over the fiefdom to the system-wide administration. It was viewed as heresy on some campuses. What happened was the University on the administrative level, became extremely democratic. There was input from this committee, input from that committee. There were over eighteen representatives sitting across from us at the table. That's ludicrous; one from each campus, and one from different departments in the system. Did you ever try to cut a deal with a group like that? The only thing that was going to work would be side-bar negotiations.

2) The University misunderstood our mission. We did not want to keep our good teachers. We wanted to protect our good teachers. We wanted job security for them but we also wanted to get rid of our bad teachers. They couldn't believe that a labor union would act that way. Their response was funny. It was the industrial model. Let's worry about wages, hours, and working conditions.

3) We also failed. We, too, were as disorganized as they were. We had different factions within our union. We failed to meet with them beforehand and set up some new and unique ground rules on negotiations. They could have helped us and we could have helped them. We both failed to see that.

4) We bred the distrust. We had one group of people from our union going in there talking nonsense. On the other side, we had some people who were going in and giving them lectures about what a university was all about. They didn't know whether they were coming or going. We didn't have a good focus.

5) When you have a nine-campus group and you don't have a centralized decision-making process, the right hand doesn't know what the left hand is doing. The theoretical problem is one of the great beauties of the Univesity of California in that you could have a Berkeley and it doesn't become a lower common denominator like Riverside, which isn't nearly as good a campus. That autonomy is crucial in the system. Since we are after superior education as an union, we were in an unbelievable dilemma. Do we push them so that the decisions are made on a system-wide basis—a process, once engrained, we may

never be able to get away from again. Then we start setting up mediocrity. Do we do this, or do we fight for autonomy?

We were stuck with a system-wide unit that played into our hands. Their plan, as we interpreted it, was to wait us out. Take their time. Spend months on it. They didn't count on a couple of things. When I worked with the farm workers Cesar Chavez used to say to us, "Remember, their greatest strength is their greatest weakness." Think about the strength that exists. The University of California's greatest strength is its wealth and its prestige. Those are their two Achilles' heels. Their greatest strength was their concept of time. The University of California amortizes loans and depreciations and has ten year master plans. They think in terms of time. The key in dealing with them is to find out how to switch time on them. To switch them around. Think of your own universities and figure out how to get their time game.

With us, it was simple. There's a concept called no unilateral actions during a time of collective bargaining. Universities cannot make unilateral changes in working conditions such as the raising of parking fees or any number of things that need to be done for the ongoing administration of a campus. As long as they weren't going to bargain with us in good faith over the terms and conditions of employment, we were going to have a lot of trouble reaching decisions on unilateral actions. We were going to demand that they bring everyone of them, even if it involved a parking change on the Berkeley campus or Riverside campus, to the collective bargaining table because we were a system-wide unit. That was our strength. With that, they either had to bargain in good faith, or they had to hold off implementation. They didn't want to go to impasse. If they went to impasse, we would run to the legislature claiming that they were not bargaining in good faith.

6) Another mistake that existed, and this is again from both of our sides, was that we failed to fully appreciate the role of the academic senate. On a campus where there's shared governance, any decision that was made concerning us couldn't be better than what the academic senate was making. We are regular faculty. I have been a visiting, temporary lecturer at the University of California at Berkeley for 14 years. I have been awarded two Fulbrights and one year at the University of Hong Kong, appointed by the president of the University of California. I'm a temporary, visiting. It's an insult.

The academic senate are the ones who talk to the administration. The administration's response to us was quite simple; we were not considered academics. We spent the first six months of negotiations trying to get them to use the word academic just once in the collective bargaining agreement. They steadfastly refused. Their chief negotiator refused to ever use the word academic. They refused to negotiate and said that they did not think it apropriate that we have a clause on academic freedom in a collective bargaining agreement. They didn't see who we were. To them, we were these part-time, one-year appointees, temporary or visiting lecturers.

A LOOK AHEAD

Where do we go with it? I think that a couple of things have to be seen. The idea that there are different kinds of lecturers has to be more understood. There are some who are just teachers and some who are researchers and some who do other work on the campus.

I think that you have to analyze who you're negotiating with or who you are in terms of those different categories. In certain categories, we'd better start thinking about certain lecturers as long-term. Those people who teach the fundamental courses in lower division and professional schools are a part of the system—people who you bring in because of their outside experience that you want to have continuously over a period of time.

Finally, the industrial model stinks; it doesn't belong in academia. If you have a union that believes in the excellence of the University of California, and if you have an administration, like we do, who believe in the excellence in the University of California, and if you have a faculty, that is a part-time, tenured faculty who believe in the excellence of the University of California we already have an accepted premise. It isn't then a question of who gets the profits, but how do we make this institution produce excellence? Therefore, we set up a whole different structure. The fourth and most important factor is that of the students who believe in the excellence of the University of California. There should be a four-cornered collective bargaining table with an administrator, a member of an academic senate, a nontenured faculty and a student. We should be able to communicate across that table and there should be a different conceptual approach. The goal is not, "I'll give you the eight-year job security/teaching rule in exchange for ten dollars more an hour or more money for surgical equipment." The question should be how to make it a better educational institution. Let's discuss it on those terms. Let's start being intelligent for a change instead of knee-jerking into the industrial model.

BARGAINING WITH "NONTENURE TRACK" FACULTY
C. THE CANADIAN EXPERIENCE

Ron Levesque
Acting Executive Secretary
CAUT

DEFINITIONAL PROBLEMS

One of the difficulties in determining how best to deal with the problems of nontenure track faculty is that no single nomenclature is in common use. For example, at some universities a sessional is someone who teaches a normal load but only for one session. At others, a sessional is someone who teaches only one course. Such people would be called part-time faculty at many of the universities. The use of the term part-time to describe those who teach less than a full load is in itself arbitrary in a university setting. Part-time is a time specific concept. Why not apply it to part of a year as well as part of a day or a week? But nontenure track employees who teach a full load for some specified time period during a calendar year must also be seen as part-time academics. Leaving this nomenclature problem aside, I intend to discuss only limited-term appointments, that is the appointments held by those individuals who carry nearly a full teaching, and often departmental, load for a specified period of time, for example 8 or 10 months each year.

The lack of willingness of national organizations to press administrations to adopt standard nomenclature and the ambivalence of tenure track faculty towards those who hold such positions has probably contributed to the proliferation of titles and definitions. It contributes, of course, to the invisibility of the individuals who hold these positions and to the exploitation that occurs.

No precise numbers exist on how extensively nontenure track positions are being used. Statistics Canada collects data on what it calls "contract appointments"; however, as every university has its own multiple definitions of nontenure appointments, it is likely that Statistics Canada figures underestimate the numbers. Year to year comparisons suggest a trend. For example, in 1977 Statistics Canada reported that 11% of the total university appointments were limited term or contract; by 1983, this percentage had increased to 15%. More nontenure track positions are being created each year. We can get a better idea of the real percentages by looking at case studies at individual universities. One such study of a large university in a major urban centre showed that limited-term contract positions had increased from 16% in 1978 to 21% in 1981. Another such study showed that the use of such positions had increased from 7% in 1978 to

34% in 1981. To some extent, such figures are a symptom of underfunding of universities. But they are also a symptom of another trend in our universities — the bureaucratization of university administrations. It is important to understand how these two features of the university landscape have worked together to reduce the percentage of tenure track positions atg Canadian universities.

THE "PROFESSIONALIZATION" OF UNIVERSITY ADMINISTRATIONS

Throughout the 1970's and the early 1980's, public expenditures on medicare and elementary and secondary education rose; in the case of medicare, these increases were rapid. For the corresponding period, however, per capita expenditures on universities dropped by 18%. It is interesting to note that enrollments at postsecondary institutions rose throughout this period (and continue to rise), whereas enrollments at primary and secondary schools continue to decline.

This same period is marked by another phenomenon — the drive to professionalize university administrations which has seen the introduction of "business school" criteria to assess "effective" management. The continued decline in government funding has provided administrations with the incentive to tighten control over expenditures and hence, over the type and conditions of hiring.

Unlike the U. S. where, I understand, this trend took hold earlier, Canadian universities did not develop a professional cadre of administrators until the 1970's; instead they followed the British tradition; administration was viewed as a necessary but uncongenial responsibility that one volunteered to undertake for a short period of time. Moreover, one's career was increasingly enhanced by the public perception of services to the university and not through staying within the confines of an established discipline. The rapid growth in university funding in the 1960's pushed our universities towards the American model. The '60's saw a dramatic increase in staff, faculty, students, funding and public attention. Governments, as well as the press, demanded public accountability; the traditions developed in previous decades aimed at servicing a small socio-economic elite were clearly inadequate to the needed reforms of the 1960's. An expanded administrative staff with management skills were widely perceived as necessary.

Although it is not clear to what extent faculty and students would have been able to resist the bureaucratization and centralization if there had been no funding restraint in the 1980's, it is clear that the funding crunch contributed to these twin phenomena. Governments in the 1970's grew tired of the universities; they had not generated an instant national economic miracle, had not prevented the oil crisis or runaway inflation. They grew tired of their needs and simply stopped funding them at adequate levels. The resulting financial restraint forced faculty unions and associations to use collective bargaining to entrench tacitly accepted standards of fairness and working conditions.

Faced with these new conditions, administrations turned increasingly to other institutions to learn about management. More and more, university administrators adopted values which were not common in Canadian universities in the 1960's and early 1970's such as the centralization of decision-making. Collegial methods were no longer seen as efficient. To some extent, such changes were necessary. Better budgetary procedures were clearly needed; better management of resources were also required. But professionalization and centralization has gone much further than this; it has attempted, with some success, to take power over academic programs and hiring. Unionization was used by faculty to entrench collegial methods of hiring and evaluation in the university's day-to-day operations.

Confronted with the need for fiscal restraint, administrations have done what comes naturally to a bureaucracy — they have begun to see themseles as responsible for delivering a "product" not as responsible for maintaining academic values. Calls for budgetary flexibility are, in reality, part of the same product-oriented approach — the product, of course, is the number of courses that can be offered. Having less money has, ironically, contributed to the administration's ability to turn the universities away from their normal goals: excellence in teaching and research.

A UNION PERSPECTIVE

It is CAUT's view that normally these two goals can only be accomplished through the continuing use of tenure-track appointments. Tenure is, for CAUT, the only realistic method of protecting academic freedom. To be sure, there are some exceptions. Limited-term appointments can be appropriately used to replace staff on sick leave, on sabbatical leave or for appointments funded on a short-term basis by government or private contract. Many of the "gypsy scholars" are forced to accept limited-term appointments because administrations refuse to create new ones are not in these categories. The tenuous connection which such faculty members have with their universities and the often less than sympathetic attitude displayed toward them by their tenured and tenure-track colleagues has made it extremely difficult for CAUT to develop and implement policy statements which effectively protect people on limited-term appointments.

The underfunding of universities, like the end of the dinosaurs, came on very quickly. Fine young scholars were trapped in the pipeline. They have had to accept unattractive positions or leave the university community. Studies conducted at universities show many of these individuals to be exceptional scholars and teachers who work for very little and who carry very heavy loads sometimes at several institutions in the same city. Almost invariably, these individuals hope eventually to get a regular tenure-track appointment. A decade of underfunding is bringing about this situation. Graduate enrollment is down in many disciplines. Such people will not be available to provide courses at less than decent salaries for very much longer.

The insecurity that such positions create leaves such people open to exploitation. How can they refuse to take on extra departmental or teaching duties? How can they resist demands that they desist in a particular course of argument or study? Their academic freedom is at serious risk.

In many cases, it is not that universities do not have the money or need to fund positions properly. Many limited-term appointments are funded year after year and sometimes, they are occupied by the same person. At one university, the collective agreement specifies that after a person has served a certain number of years in a limited-term position, he or she must be automatically considered for tenure. In order to get around this difficulty, the administration simply appoints a person to a new category of appointment. This ruse succeeded at arbitration. Moreover, faculty associations are in a difficult position. If they object too strenuously, individuals lose even the unsatisfactory jobs they have. If they do not object, the administration is able not only to institute a form of slave labor but also to alter the nature of the university.

Another unfortunate feature of the hiring of increasing numbers of individuals on limited-term contracts is that it creates artificial barriers among colleagues. The temporary status of such people restricts the normal contact. Many faculty fear that getting too close to such individuals will create difficulties if they are not renewed for another term. Not surprisingly, a large number of these individuals (perhaps 50%) are women. This is clearly well-above the percentage of women who hold tenure-track appointments. It is not surprising that so many women ae involved. The reforms of the '60's saw large numbers of women who had been denied access in the previous decades finally getting the opportunity to undertake graduate training. As their numbers began to approach what one would expect if discrimination was not a factor, universities stopped hiring.

It is unlikely that we will see any decline in the use of limited-term contracts in Canada in the near future, even if the funding situation begins to improve. After all, flexibility is the new watch word. Administrations will strive to retain the opportunity to expand and contract the faculty work force in conformity with demands for "product" in this or that faculty. Tenure-track appointments reduce flexibility and this is inconvenient for an administration whose objective is a quick response to the demands of the market and whose goal is to show a satisfactory "bottom line".

The trend to use limited-term appointments is an unfortunate one. It changes the university from a place where thinking and innovation are the goals to one where the number of courses (the "product") becomes the goal.

VII. CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE

A. A LEGAL ANALYSIS OF COLLECTIVE BARGAINING IN HIGHER EDUCATION

B. THE MELANI SEX DISCRIMINATION CLASS ACTION SUIT

CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE
A. A LEGAL ANALYSIS OF COLLECTIVE BARGAINING IN HIGHER EDUCATION

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INTRODUCTION

Employment-related cases in the courts — and even before the NLRB — have less and less to do with relations between management and labor and more and more to do with relationships between individual employees or classes of unorganized employees and their employers. These cases have been heavily concentrated on claims arising under the civil rights laws, but they also involve claims under other federal statutes. In the past few years there has, in addition, been an exponential growth in litigation devoted to attacking the long-standing doctrine of employment at will.

This trend in labor litigation is consistent with — doubtless, in part, a product of — other well-remarked trends. Union membership, as a percentage of the work force, continues to decline. At the same time, the percentage of college graduates in the work force continues to grow markedly as our economy becomes more and more service-oriented. And, this transformation of the work force promises to cause a further decline in union membership unless the unions are successful in their efforts to make greater inroads among white collar and professional employees. Finally, the spread of public sector unionism — spurred in the past by the passage of state enabling legislation — has slowed in recent years.

Despite these trends, I found, in the Supreme Court's most recent labor law decisions, a marked reaffirmation of the Court's commitment to the self-governance principles which are among the most important underpinnings of traditional collective bargaining. This I think should be of significance to those of us who are interested in labor relations in higher education and the professions. For there is surely a healthy respect among us for principles of self-governance. And, a labor relations climate which fosters such principles ought to continue to be relatively attractive to us. I will admit to a certain naivete in the foregoing observations. Labor law has frequently been shaped by efforts to gain through the courts what could not be gained through negotiation. Still, I think most of us would prefer as little interference as possible in the resolution of our day-to-day labor relations problems. If I am right about this, some of the Court's recent decisions are cause for optimism.

"PREEMPTION"

Over the course of the past year, the Court has decided several "preemption" cases. Preemption cases are, to my mind, interesting because they reveal the societal pressures most currently impinging on labor-management disputes, and they test the Court's commitment to self-governance in labor relations.

In Wisconsin Department of Industry, Labor and Human Relations v. Gould, __ U.S. ____, 54 USLW 4228(1986), the Court unanimously struck down a Wisconsin statute which prohibited convicted labor law violators from doing business with the state. Writing for the Court, Justice Blackman concluded:

> Because Wisconsin's debarment law functions unambiguously as a supplemental sanction for violations of the NLRA, it conflicts with the Board's comprehensive regulation of industrial relations in precisely the same way as would a state statute preventing repeat labor law violators from doing any business with private parties within the state....Each (such statute) incrementally diminishes the Board's control over enforcement of the NLRA and thus further detracts from the integrated scheme of regulation created by Congress.

Justice Blackman also observed that a number of other states had adopted similar laws, making clear the Court's concern to forestall such efforts by states to tip the natural balance between labor and management.

Three weeks ago the Court again came down on the side of preemption — this time on more subtle facts. A taxicab company, Golden State Transit Corporation, experienced labor difficulties with its drivers at the same time as its operating franchise with the City of Los Angeles was due to expire. An interim agreement was timed to expire the night before the City Council was to act on the company's franchise application. When negotiations failed to produce a successor agreement, the drivers struck the company, shutting it down. The next day the union lobbied the Council against extension of the franchise. Discussion within the City Council focussed on the labor dispute. The Council President made it clear that it would be difficult to get the Council to extend the franchise so long as negotiations between the company and the drivers remained unresolved. The Council voted not to extend the franchise, and it expired by its terms.

The company sued the city arguing that the city's action was preempted and seeking declaratory and injunctive relief. The District Court and the Court of Appeals ruled against the company. The Supreme Court reversed. Golden State Transit Corporation v. City of Los Angeles, ____ U.S. ____, 54 U.S.L.W. 4239 (1986).

In addition to prohibiting state regulation of activity arguably prohibited or arguably protected by the NLRA, the Court has established a principle of preemption ruling out state or municipal regulation of "conduct that Congress intended to go unregulated". See, e.g., Metropolitan Life Inc. Co. v. Massachusetts, 471 U.S. ____, ____ (1985). In this case, the Court held that the city was preempted from conditioning the company's franchise renewal on the settlement of its labor dispute, since the city's action impermissibly interfered with the parties' resort to economic self-help. Writing for all but one of his colleagues, Justice Blackman observed that: "(The settlement) condition imposed by the Los Angeles City Council. . . destroyed the balance of power designed by

Congress, and frustrated Congress' decision to leave open the use of economic weapons." For this reason, the Court held that the city's otherwise undoubted right to regulate its taxicab franchises must give way to the federal scheme for the regulation - really in this regard the non-regulation - of private sector labor relations.

In a decision announced just three weeks ago, the Court used a mundane dispute over an arbitrator's award as the occasion to reaffirm its commitment to the private arbitration of disputes arising under labor agreements. AT&T Technologies, Inc. v. Communications Workers of America, _____ U.S. ____, 54 USLW4339. The Court construed an agreement between AT&T and the Communication Workers of America. The agreement contained a broad arbitration clause, applicable to "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder," except those "excluded from arbitration by other provisions of this contract." A management functions clause provided that "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause," AT&T is free to exercise certain specified management functions, including "the termination of employment." A final relevant provision of the contract provided that "(w)hen lack of work necessitates Layoff," employees are to be laid off in a prescribed order.

CWA challenged the company's decision to lay off 79 installers, arguing that there was no lack of work at the affected facility. AT&T refused to arbitrate, arguing that its layoff decisions were protected by the management functions clause and hence, were not arbitrable. CWA filed suit to compel arbitration. The District Court ordered arbitration finding that CWA's position that there must be a lack of work prior to any layoff was at least "arguable". The Court of Appeals affirmed. That court recognized the established principle that arbitrability is ordinarily a question for the courts to decide. But it found that in the case before it, the determination of arbitrability would enmesh the court in the merits of the dispute between CWA and AT&T. For this reason, as far as the Court of Appeals was concerned, the more faithful construction of established principles required leaving the question of arbitrability to the arbitrator.

It is not difficult to sympathize with the approach taken by the Court of Appeals. The conflicting positions of CWA and AT&T overlap in a way which makes it difficult to separate the question of arbitrability from the resolution of the merits of the dispute. CWA argued that the layoff clause required an actual lack of work prior to employee layoffs. On this view, the union would be entitled to arbitrate the question of whether or not the layoffs were justified under the contract. The company, in contrast, argued that the clause merely established an order of a layoff, and that it was management's exclusive and unreviewable prerogative to determine that the layoffs were warranted.

The Supreme Court reversed, relying on the same principles as the Court of Appeals — principles established more than twenty-five years ago in the "Steelworkers Trilogy:" Steelworkers v. American Mfg. Co., 363 U.S. 564; Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574; and Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). Most of us have come to summarize those principles by emphasizing the judicial preference for arbitration of labor disputes. The Court did not at all abandon this central principle; but it reminded us as well that the preference for arbitration depends upon judicial satisfaction that the parties have, in fact, agreed to arbitrate the dispute in question. As the Court observed, the willingness to agree to private arbitration would be seriously eroded if the arbitrator had the final authority to determine his or her jurisdiction.

I think the case is significant because it demonstrates the Court's continued determination to preserve a self-governing system of labor-management relations. Were that system not under attack, it would doubtless not have been necessary for the Court to take this case at all. For it seems to me at least that under the standard of arbitrability reaffirmed by the Court, arbitration will be ordered in this case. So that the Court of Appeals decision, while perhaps resting on an incorrect formulation, was the correct one nonetheless. But in taking the occasion to underscore the role of the courts in determining arbitrability, the Court has underscored as well its continued support of a viable system for the arbitration of labor disputes.

"EMPLOYMENT AT WILL"

Perhaps the fastest growing and most widely noted area of employment law today arises out of the continuing erosion of the employment at will doctrine. Though it is by no means possible to assert that the employment at will doctrine is dead, there is no doubt that it is sick. State and federal courts across the country are continuing to find ways to allow individual employees to contest their discharges in court and to recover substantial damages if they prevail.

Although this trend is obviously most concentrated among nonunion employees, it has an impact on labor management relations for at least two reasons. First, to the extent that employees are able to secure meaningful legal protection against arbitrary dismissal without the benefit of a collective bargaining agreement, the incentive to seek the protection of a union is diminished. Second, there appears to be a growing trend on the part of union as well as nonunion employees to bring their complaints to court under the rubric of one of the emerging exceptions to the employment at will doctrine. To the extent such efforts are successful, the capacity of labor and management to govern their own relationship will also be further diminished.

While I believe that the courts will increasingly limit efforts by unionized employees to challenge their dismissals in court, the law is not yet settled in this regard. In any event, the apparent proclivity of unionized employees to bypass the grievance procedures established by their unions and to seek individual relief in the courts is itself a notable commentary on current relationships between employer, employee and union.

Probably the most widely recognized exception to the employment at will doctrine is the so-called public policy exception. Where an employee is fired for refusing to commit a crime; for disclosing his employer's criminal conduct; for exercising a statutory right; or for engaging in some other activity which warrants protection or encouragement, a substantial number of courts have allowed the affected employee to recover both compensatory and punitive damages. Thus far, the successful efforts by unionized employees to contest their discharges in court have relied on this public policy exception.

Midgett v. Sackett-Chicago, Inc., 105 Ill. 2d 143, 473 N.E. 2d 1280 (1984), cert. denied ____ U.S. ____ (1985), involved the contention that certain employees were discharged by their employer for filing workmen's compensation claims. The employees were covered by a collective bargaining agreement which contained a grievance procedure and which required discharges to be based on "just cause". None of the employee-plaintiffs availed themselves of the contractual grievance procedures. The Illinois Supreme Court, with one justice dissenting, allowed the employees to go forward with their claims, notwithstanding the fact that they were bypassing the union procedures.

Illinois law had previously recognized the tort of retaliatory discharge where an employee is discharged in violation of clear state public policy. Under Illinois law, an employee so affected can recover both compensatory and punitive damages. In refusing to leave the employees to their contractual remedies under the collective bargaining agreement, the court stressed the importance of the state policy at stake and that punitive damages, necessary to vindicate that policy, would not be available under the collective bargaining agreement. The Illinois court also rejected the employer's argument that to allow this remedy to union employees would undercut the federal labor policy favoring arbitration. In reaching this latter conclusion, the Illinois court drew an analogy to Supreme Court cases allowing union employees to pursue federal statutory rights without having to exhaust their contractual remedies.

In Garibaldi v. Lucky Food Stores, 726 F.2d 1367 (1984), cert. denied, ____ U.S. ______ (1985), the Ninth Circuit Court of Appeals faced the claim of a union-represented employee allegedly discharged for refusing to deliver spoiled milk and reporting his employer to the local health department. Unlike the employees in Midgett, Mr. Garibaldi did file a grievance under his collective bargaining agreement. Unfortunately for him, however, the arbitrator found that he had been discharged for cause. He then filed suit alleging that his discharge was based on his report to the health authorities and hence, was violative of California's public policy.

In Farmer v. Carpenters, 430 U.S 290 (1977), the Supreme Court had held that the NLRA did not preempt a tort action for intentional infliction of emotional distress under California law. Relying principally on this decision, and finding that California law would clearly allow Mr. Garibaldi's claim, the Ninth Circuit held that it was not preempted. The court concluded:

> A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in tort, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public — an interest which transcends the employment relationship.

Having found Mr. Garibaldi's claim was not preempted, the court had no difficulty finding that the arbitration award against him did not preclude his claim.

This brings me to the Supreme Court's decision in Allis-Chalmers v. Lueck, ____ U.S. ____ decided last April — after Garibaldi and Midgett. Roderick Lueck sued his employer alleging that it had "intentionally, contemptuously, and repeatedly failed" to make payments required under the disability plan negotiated with his employer by his union. Lueck did not exercise his right to challenge the company's actions through the contractual grievance procedure. Wisconsin law makes the bad-faith handling of an insurance claim a tort, and the Wisconsin courts had also apparently held that the tort applies generally to the handling of claims under disability plans included in a collective bargaining agreement.

The Wisconsin Supreme Court had concluded that Mr. Lueck's rights under the state-law tort existed independent of his rights under the contract between his union and his employer and that principally, for this reason, his claims were not preempted. The Supreme Court disagreed. It held — unanimously — that any resolution of Mr. Lueck's claim would require a construction of his contract rights and that without those rights he would have no claim at all. It found therefore that Lueck's tort claim was "inextricably intertwined with consideration of the terms of the labor contract . . . (and that because) the state tort law purported to define the meaning of the contract relationship (it) is preempted."

The Court's decision in Allis-Chalmers, like the other Supreme Court decisions I have discussed, reflects a decided preference for the private resolution of employment disputes. It does not, however, in my view, destroy the validity of decisions such as Midgett and Garibaldi. (I should note that some lower courts have, in fact, concluded that Midgett and Garibaldi are no longer valid after Allis-Chalmers).

Another Ninth Circuit decision, decided just last month, may indicate the direction of the law in this area. In Truex v. Garrett Freightlines, 121 LRRM 3065, the court held that the claims of several unionized employees that their discharges constituted intentional infliction of emotional distress were preempted. The court held that the employees' claims could be resolved by reference to the just cause standard contained in the collective bargaining agreement under which they were employed. The court relied on Allis-Chalmers and distinguished Garibaldi by holding that the employee's claims there were "outside the collective bargaining agreement". It strikes me as likely that the courts will continue to allow unionized employees to contest their discharges in court where the claim is clearly pinned to the vindication of a recognized state policy independent of the employee's contract rights; but that the courts will not let employees mask their breach of contract claims as tort claims. The distinction this development will require, however, will not always be clear or neat.

"AGENCY SHOP"

Consistent with their apparent promise to keep labor lawyers and Right to Work Committee lawyers both active and unfulfilled, the Supreme Court decided another agency shop case this term. Despite my cynicism and fatigue over agency shop cases, and with only a little intellectual dishonesty, I find I am able to fit Chicago Teachers Union v. Hudson, ______ U.S. 54USLW4231, into my optimistic "return to self-governance" theme. The decision in Hudson focussed on the propriety of a union procedure designed to accommodate the interests of dissenting non-members. In Ellis v. Railway Clerks, 466 U.S. 435, decided last term, the Court observed that "a pure rebate approach is inadequate . . . (because it affords the union) an involuntary loan for purposes to which the (dissenting non-member) objects."

The Chicago Teachers Union had determined to assess non-members 95% of the dues paid by members — a percentage based on the union's assessment of that portion of its preceding year's expenditures which were unrelated to collective bargaining. It established a procedure whereby a non-member could protest the charge assessed against him within thirty days of the first payroll deduction. The protest would be considered first by the Union's Executive Committee, then by its Executive Board, and finally by an arbitrator selected by the Union. If the protest was sustained, the objector would get a refund and there would be an immediate reduction in the future charges assessed against all non-members.

The Court rejected this procedure on three grounds. First, as a rebate procedure it was invalid as an "involuntary loan". The Court brushed aside arguments based on the arguably de minimis nature of the injury, quoting both Jefferson and Madison as to the "tyranny" involved in compelling a contribution of even "three pence" for the propagation of ideas to which one is opposed!

Second, the Court held that the Union's procedure afforded the dissenters inadequate information as to the basis for the amount assessed. And third, the Union procedure was defective in that it did not "provide for a reasonably prompt decision by an impartial decision-maker." The first two levels of decision-making, after all, involved the Union's review of its own earlier determination as to the propriety of the charges. And, the final decision by an arbitrator didn't cure this defect as far as the Court was concerned, since the Union selected the arbitrator.

In short, the Court held that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decision maker, and an escrow for the amounts reasonably in dispute which such challenges are pending."

Having begun this discussion with a gibe, let me end it with a guess: it is just possible that the Court's unanimous decision in *Chicago Teachers Union* may mark the beginning of the end of what has seemed to be almost incessant agency shop litigation. Early on in its treatment of the agency shop issue, the Court signalled its preference for internal union procedures to resolve the claims of dissenters. With this most recent decision, the Court has finally set forth the requirements of that procedure in terms the unions doubtless can and will accept and implement. My hunch is that we will find, in the next round of agency shop cases, a willingness to defer to the determinations made in the union procedures, so long as it is not credibly asserted that non-member funds have gone to finance political or ideological expenditures unrelated to collective bargaining.

If I am right, this is significant. For it will mean that a great deal of the heat has gone out of the agency shop issue without Supreme Court resolution of the precise line to be drawn between permissible and non-permissible compulsory assessments. This line has always been left unclear by the Court.

In *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), a sharply divided Court upheld the basic constitutionality of the agency shop in public employment. But the Court left unclear whether and to what extent it was permissible for unions to use compulsory payments from dissenting non-members to finance "non-ideological-non-germane" activities. That question has remained unclear, and the Court — significantly in my view — declined to clarify it in *Hudson*. The Court of Appeals had held it unconstitutional to use dissenters' funds to finance any activities not germane to collective bargaining, whether or not "political or ideological". But, the Supreme Court declined to pass on this issue, focussing instead exclusively on the adequacy of the union's rebate procedure. And, Justice White, in a brief concurrence joined by the Chief Justice, stressed that the Court of Appeals holding on this point was "very questionable".

In short, I believe that a now unanimous Court has purposely and wisely avoided the attempt to draw a precise line between permissible and non-permissible expenditures, opting instead to rely on internal union procedures adequate to the task of protecting against the misuse of dissenters' funds for political or ideological causes.

"YESHIVA"

This past year provided limited edification on the *Yeshiva* front. Two courts of appeals reviewed Board findings in favor of faculty unions. One court reversed the Board, finding the faculty to be managerial. The other affirmed, allowing bargaining to go forward.

In NLRB v. Lewis University, 765 F.2d 616 (7th Cir. 1985), the court reversed a three to two decision of the Board which had found that faculty non-managerial. The court relied principally on evidence that the Lewis faculty, acting as a body of the whole called "the faculty convened," effectively controlled a wide range of important academic policy. The "faculty convened" was presided over by a dean. But the dean had no vote and no power to veto decisions. A dissenting judge, reading from the same record, found the Lewis faculty passive and dominated by the administration. This judge would have affirmed the Board.

In NLRB v. Cooper Union, 783 F.2d 29 (2d Cir. 1986), petition for cert. pending, U.S. Sup. Ct. No. 85-1790, the Board had overruled its administrative law judge in concluding that the Cooper Union faculty, organized in 1974, were non-managerial. The Second Circuit affirmed the Board in a per curiam opinion. Acknowledging that "Cooper Union's faculty has significant authority in certain core academic matters," the court found their authority was neither "absolute" nor even "effective recommendation or control". The court cited important measures taken by the trustees with "minimal faculty input and against strong faculty opposition." The court also found faculty authority attenuated by the presence of administrators, students and non-bargaining faculty on most important governance committees, and by the fact that the deans controlled the agendas and meeting times of the committees. Finally, the court observed that "we would have to ignore the extensive evidence of conflict and of broad administrative authority to implement changes over faculty opposition in core academic areas such as curriculum to find that the Cooper Union faculty is 'aligned with management.'"

The Cooper Union decision may be of some significance, whether or not the Supreme Court grants the pending application for review. Certainly, it is of some psychological significance since it comes from the same court which first held the Yeshiva faculty to be managerial. Beyond that, the brief analysis employed by the court highlights some of the analytical difficulties with the basic Yeshiva rationale and may presage a requirement for a more stringent showing of faculty authority and alignment with management than has been thus far established by the Board in the wake of the Yeshiva decision.

In the meantime, I continue of the view that the Yeshiva decision was profoundly misguided. To my mind, it remains a liability for both labor and management because it leaves the law continuously uncertain, and forces both sides into interminable and unproductive fact-finding procedures whenever bargaining rights are sought.

CAMPUS BARGAINING AND THE LAW: THE ANNUAL UPDATE
B. THE MELANI SEX DISCRIMINATION CLASS ACTION SUIT

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Editor's Note: In addition to her function as moderator for the annual Legal Review, Joan Rome was also asked to comment on the consent decree arising from the *Melani* case. Based on her involvement in faculty staff affairs within the City University of New York, Dr. Rome was extremely well qualified to undertake this task. *Melani v. Board of Education of the City University of New York*, 17 F.E.P. No. 1618, (S.D. N.Y., 1976).

The Melani sex discrimination class action suit brought against The Board of Higher Education of the City of New York (The City University of New York) by Lelia Melani and ten other named plaintiffs on behalf of themselves and all other women similarly situated, is perhaps one of the more widely known actions alleging violations of Title VII of the Civil Rights Act of 1964. Originally filed in December 1970 in United States District Court, Southern District of New York, plaintiffs sought declaratory and injunctive relief and damages for redress of alleged employment practices and policies which discriminated against the named plaintiffs and members of the class because of their sex. In June 1976, the court certified a class consisting of all women now employed by the University as members of the instructional staff, both teaching and non-teaching, or who at anytime since 1968 (later amended to December 1970) had been employed or sought such employment. The Court denied plaintiffs' attempt to move for a preliminary injunction in May 1977, seeking retention of teaching and non-teaching instructional staff members of the class who had been nonreappointed allegedly as a result of sex discimination.

An initial trial limited to the claim of salary discrimination was held in June 1980, and the Court issued an opinion and order in March 1983, finding that the University had discriminated against plaintiffs in payment of salaries. The University has never admitted the validity of the allegations or the finding. The parties, however, after lengthy discussions, entered into, and the Court approved, a consent decree which became effective September 10, 1984. The decree resolved in full all claims alleging discrimination based on sex in violation of Title VII and any claim for damages, back pay, benefits, injunctive or declaratory for alleged discrimination, past and present.

Provisions of the decree call for the establishment of a University-wide affirmative action committee to provide policy and programmatic direction for the University's program and to monitor the implementation of the individual college affirmative action programs. The University is enjoined from future acts of discrimination against women based on sex with respect to terms and conditions of employment, including recruitment, hiring, assignment to rank, promotion, salary, reappointment, tenure, retrenchment, fringe benefits and working conditions. A women's research and development fund, funded initially at $100,000, was established to support relevant research projects and other educational programs.

Most significantly, the University agreed to establish a $7,500,000 fund for distribution to three identifiable subclasses of the member class. Some $4,000,000 was allocated to be shared by the women on the University's full time instructional staff as of September 10, 1984, in "across-the-board" payments based upon length of service during the covered period of time, (December 21, 1970 to September 10, 1984), and present salary. The awards ranged from a minimum of $100 up to $2,000 for those as maximum salary with 14 years or more of service. Women claiming present or on-going salary discrimination had an opportunity to file an individual claim for additional relief to be funded from a $1,300,000 fund or in the form of salary increments. Some $1,700,000 was allocated to pay claims brought by women severed from employment but who served on the University's full-time instructional staff during the covered period. Claims that were sustained from unsuccessful female applicants for full-time positions are to be funded from a $350,000 fund. This relief represents full payment of any and all claims of past discrimination.

In addition to the provisions for resolving claims of past and present salary discrimination, the consent decree contains procedures for filing future complaints of sex discrimination in employment decisions on promotion, appointment to a higher title, tenure, and reappointment up to the expiration of the decree in September 1987. The procedure for examining these claims somewhat parallels the grievance machinery as constituted under the collective bargaining agreement, to the extent that it involves a three step process: examination by the college President, the Chancellor, and then appeal to the Special Master. The criteria, however, for evaluating the validity of these claims, as well as all subclass one claims, are far broader in their application than the more narrowly defined criteria for evaluating grievances, because these members are entitled to presumptions and rules governing burden of proof and persuasion.

It is too early to give a comprehensive appraisal of the impact of the Melani experience but some preliminary observations can be made. A significant commitment of staff resources at the individual colleges, as well as the University's Central Office was required to initially review the approximately 2,000 individual claims that were filed. A computerized data bank requiring appropriately skilled personnel was established to keep track of the vast amount of documentation pouring into the Central Office. The major portion of this part of the process was accomplished with existent staff, at a considerable cost to otherwise busy schedules. Appeals, which are running as high as 60% to 65% in some categories, are being reviewed centrally by a small staff.

The University has received only a small number of claims alleging acts of sex discrimination since the effective date of the decree. It is not known what the outcome will be regarding the appeals relating to claims of discrimination at the time the decree became effective. None of these cases has reached the Special Master as of this time.

There has been no discernible impact on the grievance process under the collective bargaining agreement or on the nature of the grievances being filed. While there certainly have been grumblings of displeasure among males over monetary settlements and salary increases that have been granted women up to this point, no reverse discrimination charges have been made by males through the grievance machinery.

Aside from the $4,000,000 pay out which was apportioned in a relatively straightforward way, based upon rank and service, most decisions relating to Melani claims have drawn the reviewer into the world of academic decision-making with all of its attendant intangibles. Because of the confidentiality surrounding these proceedings, and because record-keeping in non-academic situations, going as far back as 1970 was found to be incomplete, many claims that might not otherwise be valid have been granted. In sum, the Melani experience has been a complicated, demanding exercise that is, hopefully, raising the consciousness of decision-makers throughout the academic community.

VIII. THE DISCIPLINE OF FACULTY

A. THE ADMINISTRATIVE PERSPECTIVE

B. THE UNION PERSPECTIVE

THE DISCIPLINE OF FACULTY
A. THE ADMINISTRATIVE PERSPECTIVE

Joan Geetter
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The need for disciplinary procedures for controlling and eliminating faculty misconduct might seem self-evident, but it isn't. There are still people around who believe faculty unlike other human beings are immune, by virtue of a Ph.D., to the ills that flesh is heir to. Those of us who deal with the everyday comings and goings of the professoriate know differently.

MISCONDUCT VERSUS INCOMPETENCE

I wish to note a few distinctions: The focus of my remarks will be misconduct rather than incompetence. I will not be dealing specifically with whose teaching evaluations are low, or who have ceased doing research. Rather I will be concerned with misconduct, by which I mean such things as the failure or refusal to carry out assigned tasks, misrepresentation, theft, the refusal to abide by legitimate rules and regulations, sexual harassment, and drinking on the job.

It is also true that even while insisting on the distinction between incompetence and misconduct I recognize that in the real world it is a difficult one to maintain. The person who drinks on the job may be chronically tardy; he may also get low ratings for teaching and perform little service for the institution. The poor ratings and the absence of service may delay or destroy chances for promotion or prevent standard salary increases, but they will not be perceived as misconduct. To the degree that they are not, they cannot be cured by the kind of disciplinary system I am proposing.

However, when drinking on the job causes a faculty member to miss class or to behave in an abusive manner during this class, then his behavior is more easily read as misconduct and thus is controllable under the system I advocate.

The success of attacks on misbehavior may also depend on the finesse with which the academic and non-academic aspects of the misbehavior can be separated and dealt with under their own systems. With such limitations in mind, let us now take a look at some contract language which attempts to deal with discipline.

THE "JUST CAUSE" STANDARD

Most contracts establish a just cause standard for disciplining faculty and may even define it.

I use as an example the following definition of just cause:

1. Just cause is a prescriptive plan developed pursuant to Article xxx;
2. or, just cause is a failure to perform assigned duties;
3. or, just cause is a serious breach of recognized standards of professional ethics;
4. or, just cause is conviction of a felony which renders a faculty unit member unfit to perform the duties of the position;
5. or, just cause is anything which substantially or irremediably impairs the ability of a faculty member to perform assigned duties.

The list obviously attempts to be comprehensive. And, it is with full recognition of the difficulty of making lists of this kind exhaustive that I nevertheless suggest that even this comprehensive language contains problems. I also understand that from the point of view of management, certain kinds of clauses—most particularly layoff and discipline clauses—are almost impossible to make perfect before the fact. These articles are like parachutes; you will never know how good they are until it is too late.

At any rate, let us go through the just cause standards of this article one by one and I think you will see what I mean.

a) For one thing, the progressive discipline imagined by the first item in the list ("failure to correct deficiencies in accordance with a prescriptive plan") is really related to incompetence rather than misconduct and is of limited value for many kinds of behavior. To put it another way, you should not need a "prescriptive plan" to get someone to stop stealing or misrepresenting his activities. You simply tell him to stop.

b) For another, what are the recognized standards of professional ethics alluded to in the second criteria? What, in fact, is a serious breach of "recognized professional ethics" and how would you demonstrate it? Specifically, what is the body conferring the "recognition" in recognized professional ethics? If a faculty member enrolls his wife in a summer class solely to get the class enrollment to a level which guarantees the continuation of the course (for which he gets paid) and then she drops the course after the cut-off date, is that a serious breach of recognized professional ethics? And what professional body would say so?

c) Or, take the third item (conviction of a felony which renders the faculty unit member unfit to perform the duties of the position). Does that mean only certain kinds of felonies are impermissible but others are okay? Which ones? And why a felony in the first place? May not less serious behavior subject a faculty member to discipline? Why, in fact, crimes at all? Surely we ought to be able to discipline our employees for something less than statutory crimes. The job of teaching is not a constitutional right which can only be ended by proving the teacher is a criminal.

In another typical list of just cause criteria to justify termination, the contract provides that "...Unit members shall be discharged for one or more of the following reasons:

a) gross professional misconduct

b) gross neglect of duties

c) commission of a serious criminal offense (such as conviction of a felony)

d) material and substantial misrepresentation of facts with respect to professional and academic qualifications, previous employment academic credentials, publications and other professional achievements.

Some of the same problems we diagnosed in the previous language appear here as well.

1. the necessity for gross misconduct

2. commission of a serious criminal offense.

I notice, in passing, that the just cause language never envisions a variation in a criminal statute from one jurisdiction to another. Having just had occasion to deal peripherally with this issue, I cannot help but ask what happens if it turns out that a given act is a felony where the faculty member lives but not where he works?

PROBLEMS WITHIN THE PROCESS

The single greatest flaw in faculty disciplinary clauses is that they are focused almost exclusively on termination. In such a state of affairs, there are no prison sentences, only hangings. It is not difficult to guess what happens next. In short, nothing. This is more serious than the shortcomings of any particular set of just cause criteria.

Without the possibility of intermediate crimes and punishments, administrators who have to live within such contracts find themselves condemned to not using their disciplinary arsenal at all. Having sunk all their money into nuclear arms, they are without small tactical weapons at their disposal. As a result, they are without resources for lots of smaller issues and may look intemperate if and when they invoke termination as their "final solution".

An additional shortcoming of most faculty disciplinary language is that while it talks about the necessity for due process, usually—perhaps purposefully, no disciplinary process is spelled out. The lack of a process may appear to benefit management. My own sense, however, is that if and when discipline is invoked, process becomes just one more area left open for contention.

It is often a nuisance to spell out procedures with foolproof language. On the other hand, I think administrators fare better when disciplinary steps are spelled out in an agreement than when they have to rely on an arbitrator's imagination to determine whether the process in a particular case has ben "due enough".

In short, then, what we see when we analyze these contracts and the handbooks which preceded them and on which they are probably based, is that for too long those of us who are charged with managing our colleges and universities have been hamstrung by policies enunciated by faculty and designed with only teaching and research in mind. In many cases, policy manuals and contracts contain grounds for termination which relate solely to the ability of the faculty member to teach or do research and neglect important reasons for discipline which may not directly relate to what goes on in the classroom. Examples of misconduct may include:

a) the assistant professor who authorizes time cards for work never performed,

b) the instructor who appropriates the gold in the dental lab,

c) the professor who habitually fails to submit student grades,

d) the professor who sips wine during an evening class, or routinely calls home to Australia on the university phone.

All of these are employees who are misconducting themselves. Yet, when we look to our policy manuals and contracts for tools to deal with such issues, we often find that the cupboard is bare. We find that actions short of termination are rarely contemplated by our policies and frequently, we find that the definitions of misconduct themselves are not particular useful. Applying evaluation criteria designed to determine someone's fitness for tenure comes too late to be of use to snare the tenured miscreant. More significantly, the quality of a faculty member's teaching, research, and service may be irrelevant when you are trying to tell him to stop putting his relatives on the payroll.

THE UNIVERSITY OF CONNECTICUT MODEL

By and large, this was the situation at my own school prior to our agreement to put a disciplinary clause in the faculty contract. There were the University Bylaws of course. And they informed me that "Adequate cause for dismissal will be related directly and substantially to the fitness of the faculty member in his/her professional capacity as described in Section B." Section B, as it happened, turned out to describe protections of various sorts. Freedom of thought, expression, association, etc.. Obviously, the people who drafted our Bylaws were concerned, rightly, that teachers not be terminated for voicing unpopular views. On the other hand, it was clear that misconduct as a real and present possibility had not been contemplated very seriously by the framers of our rules.

The very subject itself appears to have been unpalatable, which I think you will detect by the round-about way in which it is introduced. The Bylaws provided:

> if circumstances arise that on their face cause the President to anticipate the reasonable possibility of dismissal being recommended for a faculty member, the appropriate administrative officer will initiate discussion of the matter with the faculty member looking toward a mutually agreeable settlement.

The controlling idea appears to be the hope that problems will somehow go away.

Other disciplinary tools, short of dismissal, are not contemplated under our Bylaws. Suspension, while mentioned, is envisioned only as a holding tank prior to a final decision on dismissal. It is reserved for instances "when immediate harm to himself or others is threatened by the faculty member's continuance". Faced with this kind of insufficient framework within which to act, Department Heads found themselves frustrated in the extreme. They had no idea what they could and could not do for a host of delinquencies which required something short of firing, or academic capital punishment.

It was in this kind of setting that the union—specifically the AAUP—and the University first agreed to a disciplinary clause in the contract. For the first contract, I had a number of goals in mind which, it turned out, the union was willing to agree to. These included:

I. A plan to separate incompetence from the sins contemplated by the term misconduct. This would prevent a person from alleging that the failure to be promoted or to achieve tenure was akin to discipline and thus entitled him to a just cause standard of review.

II. To apply traditional progressive penalties (warnings, reprimands, suspensions) to teaching faculty.

III. Not to arbitrate minor disciplinary actions like warnings and reprimands. Arbitration was reserved to serious discipline only.

I then set forth a fairly traditional set of thou shalt nots which could be invoked specifically rather than leaving it to the imagination or courage of a given department head to determine whether something was truly verboten or not. This list broke into four areas:

a) neglect of assigned responsibilities

b) insubordination or noncompliance wth University Bylaws relating to faculty

c) fraud, collusion, concealment, or misrepresentation of a faculty member used to gain employment, tenure, promotion, salary increase or other benefit

d) and finally, sexual harassment or other conduct impairing the rights of students or other staff.

It took only one round of experience with this language to determine that it was insufficient. I have recently enlarged it to include ethical misconduct (like conflicts of interest) and misconduct related to research. No doubt other omissions will make themselves felt as we continue to live with the clause.

After a two step hearing procedure, the grievant may appeal to arbitration on the merits of his case. In no case shall the outcome of a promotion, tenure or reappointment process be construed as falling under the disciplinary article. In anticipation of faculty resistance to that first disciplinary clause, the Union wanted sunset language added to the clause, to which we agreed.

THE RESULTS OF THE PLAN

On the part of a small group of faculty who were aware of the imposition of a structure on problems which had rarely seen the light of day, there was something of a fracas and an attempt to sabotage the agreement. Members of that group phoned to inform me that they would personally see to it that the whole package went down on that account. In spite of this, the final vote was overwhelmingly in favor of the agreement.

There were a number of reasons for this. For one thing, the money package that year was generous. More cynically, I suspect the discipline article succeeded because the truth is that unless it hits home, most people simply do not pay much attention to someone else's behavior or care about grievance machinery. Unless you are professionally involved, the nuances of contract language and the strategizing of grievances is of no interest. The few faculty members who understood the implications of the change and were upset were insufficient to carry the day.

What has been our experience with the agreement? It is too early to tell definitively. On the other hand, without actually being invoked more than a few times, it has proved highly useful. You might say it is more useful as a threat than a reality. It has produced one resignation and one ungrieved denial of a salary increase. The resignation had to do with plagiarism, and the denial of the salary increase with a habitual refusal to hand in grades. It produced one near termination for going AWOL, which was resolved by withholding salary. It produced a reprimand for the claim of attending a conference which was not attended. It has produced warnings that called into being—for the first time—logs of activities and plans of action.

By giving them a vocabulary and a process other than termination, the discipline clause has enabled department heads, honest enough to admit the existence of problems and brave enough to attempt to deal with them, the equipment to do so. I suppose you could say they now have a set of swords to rattle. But they are real and-if you use them correctly, they can cut. Of course, some department heads will never use them no matter what. Others have not had the occasion, and still others just feel better knowing they are available.

Progressive discipline has also permitted us to put some teeth into our protestations about the impropriety of sexual harassment.

It also has shortcomings and areas which remain problematic. Off-campus misconduct, for instance, the kind that compromise on-campus effectiveness is still difficult to deal with. To give you an idea—made up—how do you handle the case where a faculty member, a very productive faculty member, gets arrested in another state for professional conduct which destroys his credibility as a teacher? What does one do when a marriage counselor gets arrested for soliciting prostitutes? Typically, a school does not have the resources to investigate such off-campus behavior or to ascertain the truth of an allegation. It may also be difficult to prove how misconduct off-campus effects a school negatively. Damage to a reputation is hard to prove. How can I show you how many 18-year olds did not come to the campus this year because of negative publicity?

Another unmined area of faculty misconduct is misconduct related to alcohol. We have an enormous job of education to do before academics confront alcohol issues directly, nevermind learning nuance like recognizing that alcoholism is the defense for a faculty member's misconduct, and not the misbehavior itself. For instance, how do we handle the alcoholic researcher dealing with nuclear materials?

CONCLUSION

Obviously there is still much work to be done. The rigors of a just cause standard are unknown to most academics. They have no idea what tests must be met under that rubric, whether it be the promulgation of regulations, or the requirements of proof.

So too, most academic managers haven't the faintest idea how to hold a counseling session or deliver an oral reprimand. The oblique criticism, mixed with a hallway greeting, is asked to pass muster as fair warning, while the critical interview itself, usually approaching the subject at hand in the most euphemistic manner, is just as likely to end up convincing the reprimanded employee that he has received a commendation.

In spite of these continuing problems, my sermon is meant as an exhortation. We should stop kidding ourselves and recognize that when it comes to misbehavior, faculty can hold their own with the rest of us. As managers, let us forget our embarrassment, admit that misconduct exists and begin to mete out a few punishments.

THE DISCIPLINE OF FACULTY
B. THE UNION PERSPECTIVE

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The question of the discipline of faculty is indeed one of the most serious facing the academy today. It should, however, be pointed out that academia is, by no means, unique in this regard. All professions in the United States are facing an imperative to develop methods of policing their own members. Those of us who are involved in working with the malpractice insurance crisis and drug testing in baseball, are familiar with the pressures being placed on these professions to put their houses in order.

The problem of disciplining a profession is by no means new. There's always been a recognition that tenured appointments could be revoked for cause. For example, the statute establishing tenure for the faculty for the City University of New York notes that it can be revoked for "conduct unbecoming the profession". It does not, however, define what that conduct is. Even Justices of the U.S. Supreme Court are appointed to the bench for "life and good behavior". There is no definition of what good behavior is. These definitions are not easy. Standards of acceptable behavior or good behavior and professional obligation change from generation to generation.

The problem of dealing with what is deemed to be acceptable remains constant. The current national concern for excellence in educational reform has brought the matter of dealing with breaches of conduct in professional obligation to the forefront.

When the New York State Senate Committee on Aging was considering the matter of repeal of mandatory retirement of tenured faculty at age seventy, it was argued that this discriminatory statute must remain unamended because tenure and academic freedom effectively prevent institutions of higher education from eliminating from their faculties the crotchety, the senile, and the boring. Fortunately, the suggestion that age discrimination is the resolution to this problem and a sound way of dealing with advancing age, was rejected on the grounds that there are already procedures in place. The Committee reported out the repeal.

The alternate route to address problems resulting from the decline of powers due to age which affect some, but by no means all, and often occur before the age of seventy, as well as a host of other behaviors stemming from the human condition from which the professoriate is by no means immune, is progressive discipline.

THE ROLE OF DISCIPLINE

A properly constructed discipline article in a collective bargaining agreement should be prized by both labor and management. Properly enacted, it serves common goals; the goals of quality education and that of professional excellence. It also serves the separate interests and responsibilities of the two parties.

The American Arbitration Association has had long experience with discipline actions and the determination of "just cause". Decisions by arbitrators have established a common law definiton, which is really a set of guidelines, to be applied to the facts of any individual case. These guidelines, I believe, are sound and with modest adaptation will work effectively in the academic world.

The generally accepted purpose of progressive discipline is the prevention of disruptive behavior and the correction of such behavior. Discipline should not be used as punishment unless all else has failed. Progressive discipline requires publication of procedures, investigation of charges and the establishment of proof before envoking disciplinary action. Consistent application of such discipline and the establishment of penalties of increasing severity for repeated offenses serve as a prerequisite to dismissal, unless an offense is of a serious nature. Records must be kept and penalties must be designed to fit the offense. A good discipline procedure is not an easy procedure.

Unfortunately, as the arguments by the supporters of mandatory retirement for tenured faculty point out, the concept and procedure of discipline is one of the least known and least appreciated aspects of collective bargaining agreements. It is also one of the most thoroughly misunderstood and regularly abused aspects of such agreements. Discipline is almost completely misunderstood by faculty, particularly those who have no need for its protections. It is equally misunderstood and grossly abused by management.

When first introduced into contracts in higher education, discipline articles were greeted with frank hostility by many members. Many considered it to be violative of the basic protections and values of the tenure system and destructive of the traditions of collegiality. To these concerned persons, discipline, placed in the hands of management, was one more weapon to dismiss persons whose behavior, conduct, and perhaps ideas, did not conform to or coincide with an administrator's, or a community's code or established wisdom. They did not understand that progressive discipline is, in fact, a classic protection of due process rights and an essential buttress against capricious and arbitrary managerial actions.

Other faculty saw it as the creation of an adverserial procedure which would erect artificial barriers between colleagues in the academic community. Some viewed it as the replacement of a time-honored process with a legalistic procedure devoid of the human influences and values which had been, in their judgment, the hallmark of academe in dealing with problems common to humanity.

Those faculty, generally hostile to the introduction of collective bargaining to higher education in the first place, saw discipline procedures sanctioned by contract as one more illustration of the imposition of the despised industrial model on their beloved academic community. Discipline seemed to be further evidence of the union's hostility to excellence. Incorporation of such procedures in the hands of the union leadership became a highly effective weapon to protect the incompetent, the senile, and the outrageous. Needless to say, none of these fears have proved substantial where progressive discipline is effectively operative.

PROGRESSIVE DISCIPLINE: THEORY AND PRACTICE

Union leaders are committed to progressive discipline for several reasons. Most of us firmly believe that the first term and condition of our employment is a quality university. None of us want to see the excellence we prize so highly eroded through the protection of the incompetent and the senile among us. Unions are not in the business of preserving the presence in the academy of the incompetent and the incorrigible. The continued functioning of such persons in our community is patently destructive and harmful to all of us and the values we prize. But unions have the obligation to protect those we represent from arbitrary, capricious, unreasonable and/or discriminatory action whether the accused is guilty or innocent. This obilgation is just as real whether the arbitrary, capricious, unreasonable and/or discriminatory action is the result of decisions by management or the product of the peer review process. Executing this duty is not always easy given the misunderstanding and abuses which creep in even when collective bargaining agreements contain appropriate protective language.

Properly administered discipline can and does work. Behaviors are modified, and valuable employees are preserved to the community. Careers and even lives are saved. But the best designed system does not always work. Many share a distorted and erroneous perception of the purpose and process of discipline, believing that it is, indeed, the way to dismiss the tenured troublemaker. They see it as a sanction method of subverting tenure and cleansing the academy of the so-called "dead wood". The more clever administrators see progressive discipline, however laborious and time-consuming the process may be, as a means of aborting the peer review process and preventing the advancement (through promotion, merit, or discretionary raises) of their academic adversaries. They have on occasion, through exploitation of the system of discipline, effectively harassed such persons ultimately forcing resignation or premature retirement.

There are those, however, who correctly perceive the value and the need for progressive discipline procedure; but among them, there is often a tendency to get caught up in what I call the "red queen" syndrome. An incident occurs, discipline is invoked, and the "off with the head" approach is utilized. The ultimate penalty, dismissal is imposed when it is totally inappropriate to the offense. Only a discipline procedure with an outside arbitrator can undo the damage caused by this type of rush to judgment.

One of the little appreciated by-products of progressive discipline procedures is the enhancement of managerial skills to the benefit of all parties. Management is forced to manage producing a better operation. If managers can act in an unchecked, arbitrary and capricious manner, they do not have to develop managerial skills of a high order. Ideally, contracts which require progressive discipline and due process procedures to invoke it, involve true evaluation of work over the years and shared statements of that evaluation. Laziness or cowardice often lead administrators to avoid early confrontation or negative evaluation. After all, no one enjoys telling a colleague to his face that his work is not acceptable, that his behavior is incorrigible, or that he is not doing a good job. If this were not true, there would be no need for mandatory retirement at any age. Genuine decision-making is not made in such a circumstance until the situation gets totally out of hand. With no real warning, discipline is invoked in the spirit of the "red queen". As one of my union members said when confronted with a situation, "You know a slap in the face is always preferable to a knife in the back."

EFFECTIVE USE OF "THE SYSTEM"

An employee should not be the victim of a system that gives no warning. The lazy or the cowardly supervisor should fall by the wayside and properly administered discipline procedures can facilitate this in one of two ways. The supervisor can learn to develop the skills and the courage to do the job, or higher levels of management can manage and remove him or her from that decision-making position.

In a very large university system, the lowest level of management effectively makes life and death decisions on a professional life. It is only with progressive discipline that top management is forced to look at and evaluate the actions of the lowest levels of management. On more than one occasion, in my experience, the investigation required to defend an administration has caused recognition of the capricious nature of an initial disciplinary action because of bias on the part of a supervisor or even extenuating circumstances in the employee's life leading to, before arbitration, reinstatement or modification of penalty.

All too often, the complexity of the process and the amount of work involved in investigation and recordkeeping causes management to by-pass the system. They seek alternative routes to accomplish the removal of undesirable employees. They might create a "seriousness conduct committee", in an extra-contractual fashion, or use the good auspices of outside agencies, such as the National Collegiate Athletic Association. They subvert the system and allow for back door punishment. Whether motivated by lethargy or maliciousness, the subversion of progressive discipline does violence to the agreement. In my mind, it causes all to suffer for the transgressions of a few.

I'd like to focus on one case in our files, which, I think, illustrates a number of these problems. This is the case which we at UUP call the "Two to Tango Case". One day in July, a tenured physical education instructor opened his paycheck and found a dismissal for cause notice because he had committed acts of sexual harassment. It took the union eight of the ten prescribed grievance time limit days to convince this gentleman that he had a serious problem. Management was serious; he had been fired. He claimed, "Sexual harassment? I didn't rape anybody. I didn't seduce anybody. What kind of nonsense is this." Well, it was very serious nonsense.

The investigation followed. The facts came out. What had happened was, this instructor was using a student to demonstrate the tango, this was a ballroom dancing class. The tango, if you know anything about it, is a very sexy dance. In the process of this demonstration, he brushed his elbow against her breast. Instead of apologizing in a gentlemanly fashion, he made a rather embarrassing remark. He turned to the class and said "ladies and gentlemen that's what a dirty old man would do". The young lady in question was very distraught. She filed an harassment charge against him. Several of his faculty peers saw this as an opportunity to get him. They put tremendous pressure on the administration. The result was "off with the head". The arbitrator sustained the grievance and reduced the penalty from capital punishment to a letter of discipline in his file citing the inappropriate language used and recommending a change in behavior.

One would have thought the issue was over, that progressive discipline had triumphed. Wrong. The misunderstanding of what had happened in this case was rife. To this day, there are persons on that campus who will not accept the fact that justice had triumphed. Here is a man who paid a penalty appropriate to the transgression, but he has not been forgiven because of the general misunderstanding on the part of colleagues and, to a certain extent, students.

I believe in progressive disciplinary procedures, properly constructed and vigorously pursued, by both parties. I have faith in the university to police itself with such a system, but only if there is mutual commitment to make it work. I think it is incumbent upon all of us to make the system work and that labor and management, in partnership, must undertake a progam of education.

Unions must systematically and regularly educate their members to the need for and the value of progressive discipline procedures. Special attention must be paid to the development of an acceptance of the outcome. When a person is found guilty and pays an appropriate penalty, he does not spend the rest of his life explaining his guilt. On the other side of the coin, management must undertake special training for all levels of supervisory personnel, in the use and abuse of the system. Only when these two things are accomplished will progressive discipline serve the purpose which both parties seek; the promotion of mutual goals, mutual trust, quality education and professional excellence.